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REPORTS OF CASES

UPON

APPEALS AND WRITS OF ERROR

IN THE

House of Lords,

DURING THE FOURTH SESSION OF THE FIFTH PARLIAMENT
OF THE UNITED KINGDOM,

56 GEO. III. 1815—1816.

BY P. DOW, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. IV.

LONDON:

PRINTED FOR W. CLARKE AND SONS,

LAW BOOKSELLERS, PORTUGAL STREET, LINCOLN'S INN;

AND BALDWIN, CRADOCK, AND JOY, PATERNOSTER-ROW.

SOLD BY W. BLACKWOOD, EDINBURGH; AND C. F. ARCHER,
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C. Baldwin, Printer,
New Bridge-street, London.

Chief Judges of the Courts of original Jurisdiction, from which Appeals and Writs of Error lay directly to the House of Lords during the Period of these Reports.

ENGLAND.

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LORD ELLENBOROUGH, *Lord Chief Justice of the Court of King's Bench.*

RT. HON. SIR ALEXANDER THOMSON, Knt. *Lord Chief Baron of the Court of Exchequer.*

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IRELAND.

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RT. HON. W. DOWNES, *Lord Chief Justice of the Court of King's Bench.*

RT. HON. STANDISH O'GRADY, *Lord Chief Baron of the Court of Exchequer.*

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REPORTS
OF
APPEAL CASES
IN THE
HOUSE OF LORDS,
During the Session, 1816.
56 GEO. III.

=====

ENGLAND.

APPEAL FROM COURT OF EXCHEQUER.

MUCKLOW—*Appellant.*

ATTORNEY GENERAL—*Respondent.*

THE Commissioners of Accounts appointed under 20 Geo. 3. Feb. 16, 25, c. 54. having recommended the abolition of the office of the nineteen King's waiters in the Customs, the number from that period was not filled up, and the fees of the vacant offices were generally applied to the use of the Customs' Superannuation Fund (now abolished by 51 Geo. 3. c. 55.) though without any legislative authority. By 38 Geo. 3. c. 86. the vacant offices of waiters were abolished subject to regulation, and the fees for such offices received previous to July, 1798, were ordered to be applied to the fund. The Appellant was appointed receiver in 1799; but as the Act 38 Geo. 3. made no provision for the appropriation of the fees of the vacant offices subsequent to 1798, he retained them in his own hands. By 47 Geo. 3. sess. 1. c. 51. the fees of offices, vacant and abolished under 38 Geo. 3. c. 86. received since July, 1798, were directed to be applied to

1816.
 CUSTOMS
 KING'S WAIT-
 ERS.—TRUS-
 SEE.—INTER-
 EST.

Feb. 16, 25,
1816.

CUSTOMS
KING'S WAIT-
ERS.—TRUS-
SEE.—INTER-
EST.—COSTS.

the fund. An information was, in 1807, then filed in the Exchequer against the Appellant for the fees which he still refused to pay, alleging that they ought not to have been received at all, and might be reclaimed by the merchant, or that, if receivable, they belonged to the surviving King's waiters, &c. But it was held that the fees were consolidated, and properly received from the merchant in full, but that the offices were separate and distinct, and that the fees did not go to the surviving waiters—and the court below decreed for the Crown for principal, interest, and costs. But, on appeal, though the Appellant had admitted in his answer below that he had mixed this money with his own and so derived profit from it, the Lords held that, as the money remained unappropriated till 47 Geo. 3. interest ought not to be demanded during the period between 1798 and 1807; and that, as it was a fair question whether the money did not belong to the surviving waiters, the Appellant ought not to be called upon to pay costs to the Crown.

The Lords were of opinion that this, being public money, might be sued for by the Attorney General in his own name alone; but that, as the managers of the fund had been added as Relators upon the suggestion of the Appellant himself in his answer below, whether the information was objectionable in a general view on that ground or not, he was precluded from availing himself of that objection.

Rule 24 an-
nexed to and
made part of
the Act.

King's wait-
ers.—Their
fees.

BY the 12th Car. 2. c. 4., which was an act for granting certain duties of tonnage and poundage to his Majesty, it was enacted "that no officer, &c. "belonging to any Custom House shall exact, re- "quire, or receive any other or greater fee of any "merchant, &c. than such as are or shall be estab- "lished by the Commons in Parliament assembled, " &c." In pursuance of this authority the House of Commons, by an order dated 17th May, 1662, signed by their Speaker, appointed and regulated the fees to be taken by different officers of the customs, and among others by certain officers called King's

waiters. They are mentioned in the Order of the Feb. 16, 25, Commons in these terms: "To the King's Majesty's 1816." "waiters, *being in number eighteen,*" and then followed the fees which they were authorised to demand. CUSTOMS KING'S WAITERS.—TRUSTEES.—INTEREST.—COSTS. Another officer was afterwards added to the King's waiters (it did not appear how nor when), making their number 18, afterwards 19. the number *nineteen*. This however was constantly acquiesced in, and the fees were divided into nineteen instead of eighteen shares.

By the act 20 Geo. 3. c. 54. a Commissioner of Accounts was appointed, and the Commissioners in their 14th Report, dated 30th Dec. 1785, recommended the abolition of certain offices in the Customs, including that of King's waiters. In consequence of this the offices, as they became vacant, were not filled up, though the fees were still collected, the offices not being abolished. The fees of such vacant offices appeared to have been generally applied in augmentation of the Customs' superannuation fund, though without any legislative authority for it. This fund had been established at the beginning of the last century by the parties concerned, with the approbation of the Treasury, and was formed at first by small deductions out of the salaries of the officers, and an allowance was made out of it to superannuated officers of the Customs without regard to the pecuniary circumstances of the object. There was no legislative enactment for the establishment or regulation of this fund, of which the Commissioners of the Customs took upon themselves the management. In August, 1797, Mr. Long, Secretary of the Treasury, wrote a letter to the Board, desiring that the fees of the vacant

The abolition of the office recommended, and the offices not filled up as they became vacant.

The Customs' Superannuation Fund.

The fund abolished by 51 Geo. 3. c. 55. and the amount, &c. transferred to the consolidated customs.

Letter, August, 1797, desiring that fees of vacant offices of King's waiters might be paid to the superannuation fund.

Feb. 16, 25,
1816.

CUSTOMS
KING'S WAIT-
ERS.—TRUS-
TEE.—INTER-
EST.—COSTS.

Act 38 Geo. 3.
c. 86. s. 2. 3. 4.
prohibiting
the filling up
of the vacant
offices, and
abolishing
them save as
there men-
tioned, and
directing the
fees received
for such offices
previous to
July, 1793, to
be paid to the
fund.

offices of King's waiters might be paid over to the superannuation fund.

By the act 38 Geo. 3. c. 86. it was enacted that the offices of King's waiters and others should not be filled up by patent or otherwise, save as therein after mentioned; and that such of these offices as were vacant should be and were abolished, save as thereafter provided; and that the rest should be abolished as they became vacant, save as thereafter mentioned; and that the money which had been or might be received *previous to the 1st of July, 1798*, for fees of offices so abolished and vacant as aforesaid, should be applied in augmentation of the superannuation fund. By this act the Commissioners of the Customs were empowered to consolidate and abolish these offices, to appoint other officers to discharge the duties, &c. No further attendance was to be required of the existing officers than before. The abolition therefore appeared to be subject to the regulation of the offices by the Commissioners of the Customs.

Appellant ap-
pointed 1799,
receives and
retains the
fees.

Mucklow was appointed to the office of clerk of the rates in 1799, and received the fees, out of which he paid 1-19th to each surviving waiter, the number being then thirteen; the surplus he retained in his own hands, refusing to pay it for the use of the fund on the ground of the uncertainty to whom it was due.

Passed April
5, 1807.

Fees received
since July,
1798, applied
to superannu-
ation fund.

By 47 Geo. 3. sess. 1. cap. 51. it was enacted that the money received *since* the 5th of July, 1798, or which might be at any time thereafter received for fees of offices in the Customs (without specifically mentioning the King's waiters) so abolished

or vacant (viz. by the act 38 Geo. 3. c. 86.) should be applied in augmentation of the superannuation fund. Feb. 16, 25,
1816.

Mucklow still refusing to pay, the Attorney General in his own name alone, in M. T. 1807, filed an information against him in the Exchequer Chamber, praying an account and payment for the use of the superannuation fund. Mucklow in his answer insisted that the vacant offices were abolished by the act 38 Geo. 3. c. 86., and that the fees ought not to have been received at all, and that the receiving them was contrary to the act 6 and 7 William and Mary, c. 1. s. 2., and that if receivable they belonged to the surviving waiters; and he denied that he had derived any emolument or interest from the money, except as having at times mixed it with his own money and derived profit from it, but what amount of interest or profit he could not state. He also objected to the information for want of proper parties.

CUSTOMS
KING'S WAIT-
ERS.—TRUS-
SEE.—INTER-
EST.—COSTS.

Information
M. T. 1807.

Answer.

Appellant de-
rived profit
from the
money retain-
ed by mixing
it with his
own money.

The information was, according to suggestion in the answer, amended by making the surviving waiters Defendants, and afterwards by adding the Commissioners of the Customs as Relators. In H. T. 1810, Mucklow paid into Court in obedience to an order to that effect, the principal sum of 9599*l.* 0*s.* 3*d.* arising out of those fees, and then admitted to be in his hands. About this time the surviving waiters brought an action in K. B. against Mucklow for these surplus fees. The Court was of opinion that the officers held several and distinct offices, and that each could claim no more than his

Hudson v.
Mucklow, 12
East. 273.

Feb. 16, 25, nineteenth part or share of the fees, however the
1816. number of existing officers might be reduced.

CUSTOMS
KING'S WAIT-
ERS.—TRUS-
TEE.—INTER-
EST.—COSTS.
Decree, June
1811.

The cause having come on to be heard, the Court on the 27th of June, 1811, decreed an account of the fees of these vacant offices received by Mucklow since the period of his appointment, and directed that interest at four per cent should be computed on the sums received on account of such fees when and as often as they amounted to 100*l.*, and that the Defendant Mucklow should pay the Crown's costs to be taxed.

In a note of the grounds of judgment in the Exchequer annexed to the Appellant's case, it was stated that the Court in giving interest proceeded on the principle laid down by Lord Thurlow in *Perkins v. Baynton*, 1 Bro. Ch. Ca. 375. The cause was reheard, and on the 11th of June, 1812, the decree was affirmed; and from this decree and decretal order of affirmance Mucklow appealed.

Romilly and Brougham. 1st, The Attorney General could not sustain this suit. It was not a public, but a mere private fund, and therefore the Attorney General could not proceed by information in his own name alone. It was not a public charity, and was held not exempted as such from the income tax, and therefore the Attorney General could not proceed at the relation of others. And, if not a charity, even if it should be considered as a matter of public revenue, the Attorney General could not proceed as he had done in this case at the relation of others, but ought to have proceeded in his own

name; for in a question of revenue the Attorney General does not proceed at the relation of others. Feb. 16, 25,
1816.

And at any rate not only the surviving waiters, but the representatives of such as had died since the offices were allowed to remain vacant, ought to have been parties, and likewise those who had paid the fees, as they might contend that they never ought to have been paid. 2d, The offices had been abolished as they became vacant, and therefore the fees ought never to have been received; so that neither the managers of this fund nor Mucklow had any title to them, and Mucklow was still liable to an action by the merchant for them, and an action had in fact been brought by the surviving waiters for them, in which however the question was decided against them. 3d, Though the claim for the fund should be held to be well founded, it did not arise till 1807, so that no interest ought to be charged for the sum previously received. They spoke of a trustee being liable for interest on sums improperly retained by him, but how could there be a trustee without a *cestui que trust*? 4th, Mucklow under these circumstances ought not to have been found liable in costs.

Solicitor General (Shepherd) and Mitford (contra). 1st, As to the objection for want of parties, Mucklow ought to have demurred in the first instance, or filed his bill of interpleader and paid the money into Court. This fund was in the nature of a public charity, of which the Commissioners of the Customs were trustees, and the Attorney General rightly sued by information at their relation.

Feb. 16, 25, 1816. If the Attorney General had sued in his own name they would say that this was not a matter of revenue.

CUSTOMS
KING'S WAIT-
ERS.—TRUS-
SEE.—INTER-
EST.—COSTS.

But even though he might have proceeded in his own name, it did not follow that he might not proceed at the relation of another. (*Lord Redesdale*.

There have been instances where the Crown officer, though he might proceed in his own name, has required a relator ; as where the right is doubtful it becomes the Crown to have a relator, that the Court may award costs if it thinks proper.) 2d, Mucklow could be liable to no action by the merchant, as the fees were indivisible as to him and rightly exacted in full, and it was impossible at any rate that they could be called back. Yet the fees were separate as to the waiters, and the survivors had no title to the surplus ; and so it had been decided in *Hudson v. Mucklow*, 12 East. 273. Besides, the act 47 Geo. 3. c. 86. by appropriating these fees to this fund, destroyed all other claims, and would be Mucklow's indemnity. 3d, As to the question of interest, however Mucklow might be justifiable in resisting the Commissioners' claim under Mr. Long's letter, when the act 47 Geo. 3. passed he was glaringly a wrongful holder, and ought to pay interest. (*Lord Eldon*, (C.) I see no difficulty in your way as to interest after 1807 ; but what becomes of your interest between 1798 and 1807, when the Commissioners had no title ? Mr. Long's writing a letter could not bind Mucklow, and the act 38 Geo. 3. related only to fees previously received.) But he received the money not for himself but for others, and as he made interest of it there could be no injustice in making him pay interest. 4th, Then as

to costs, this is a public officer keeping the public money in his own pocket, and he ought to pay costs.

CUSTOMS
KING'S WAIT-
ERS.—TRUS-
TEE.—INTER-
EST.—COSTS.

Lord Eldon, (C.) This was an information against Mucklow, by his Majesty's Attorney General, at the relation of the Commissioners of the Customs. And I mention that fact, as an objection was made in argument to the information on that ground. But I do not enter into any discussion on that point, because, whatever may be the value of that objection on the general ground, as the Appellant himself insisted below that the Commissioners ought to be parties, it does not in the present instance deserve much attention.

Judgment,
Feb. 25, 1816.
Where certain
persons were
made parties
to an informa-
tion below on
the suggestion
of the Defend-
ant, he cannot
be permitted
to object to the
information,
on appeal, on
the ground
that these per-
sons ought not
to be parties.

The judgment of the Court of Exchequer was to this effect—(his Lordship here read the Decree, and after noticing the Order of the House of Commons, the number of the waiters, eighteen, afterwards nineteen, and the provisions of the act 38 Geo. 3. c. 86. proceeded): I have only to observe on that act that it applies only to the fees received previous to 1798, and has no application whatever to what was received after 1798; and it might be questionable whether it was meant that any fees at all were to be received after that period. I think that was not the meaning. But if the matter was at all doubtful, it cannot be considered as vexatious to have agitated the question.

The Appellant was appointed Clerk of the Rates in 1799, and then the question might arise whether these offices could be filled up; and if not, whether the fees of the vacant offices ought to be collected at all; and if they could, whether they were divisible into

Feb. 25, 1816, eighteen or nineteen shares, each surviving waiter

CUSTOMS

KING'S WAIT-

ERS, WINTER-

TAX, WINTER-

ERS, COSTS

to receive only his eighteenth or nineteenth share, and the surplus to be carried over to some other purpose, such as this fund; or whether the whole of the fees received ought not to be divided among the surviving waiters; and whether the receiver might not be liable to an action by the surviving waiters, or to an information by the Attorney General. It might be considered as difficult to say whether they should have been received at all, or to whom the receiver was accountable for them after he had received them; and this difficulty was countenanced even by the opinions and conduct of the law officers of the Crown themselves.

In 1807 an information was filed by the Attorney General to have the money thus received applied to the purposes of the superannuation fund, and to this information only himself and the Appellant were parties. To this information an answer was put in by the Appellant, and he insisted that the Commissioners of the Customs, &c. should be parties. I should have stated that, in the 47th of the King, an act passed, by which the fees, &c. of offices in the Customs, abolished or vacant, under the act 38 Geo. 3. c. 86., which had been received since the 1st July, 1798, should be applied in augmentation of the superannuation fund, &c.; and it appeared to be considered that all claims were set aside, except that of the public, for the purposes of this fund, and that the money was now legally applicable in this manner. But though I think that correct, yet it is no very easy thing to say what is the meaning of the act altogether, which is not drawn with that precision which is desirable in

47 Geo. 3.
st. 1. c. 51.

acts regulating transactions between the public and the individual. Feb. 26, 1816.

Then the Attorney General amended his information, and made the surviving waiters parties to it, but not any representatives of deceased waiters; and it appears that an action was brought by the surviving waiters, insisting upon their right to the whole of the fees. The Court of K. B. considered the offices and fees as separate and distinct, and that the fees of such as became vacant devolved to the public; and that was its decision. But it was that only which set at rest this question, and led to the decision in the Exchequer. Then the Attorney General again amended his information, by adding the Commissioners of the Customs as Relators, and the Court made the decree which I have mentioned.

First, as to whether this fund can be considered as a charity, I say nothing on that head, as I have no doubt, attending to these acts, that the fees were public money, and might be sued for as such by the Attorney General alone. But as to whether the Commissioners could properly be made parties, the Appellant, for the reason which I before stated, has no right to be heard on that question. Then taking this to be public money, and liable as such to be thus called for after the passing of the act 47 Geo. 3. it appears that there is no good objection to this decree, except in so far as it gives interest upon the money during the period between 1798 and 1807; and except likewise in as far as it gives costs against the Appellant. I agree in the principle that, in the case of a trustee, whether ex-

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ERS.—TRU-
STEE.—INTER-
EST.—COSTS.

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Mucklow,
12 East. 273.

If a trustee
has received
money as

Feb. 25, 1816. cutor, administrator, &c., if he has received money

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TRE.—INTER-

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such, the

mode in

which, and

person to

whom it ought

to be paid

over being

ascertained,

and instead of

putting it out

of his hands,

makes profit of

it for himself,

he shall be

charged with

the profit or

interest: *secus*,

it seems,

where it is not

clear how and

to whom the

money ought

to be paid.

Where the

Crown sued

for money,

and the Deft.

resisted, there

being a rea-

sonable doubt

whether the

money did not

belong to

other parties,

though the

Crown suc-

ceeded, it was

held to be too

much to visit

the Deft. with

the payment

of the Crown

costs.

in that capacity, and the mode of putting it out of his hands is ascertained, he ought so to put it out; and that if he derives profit from it, he ought to be charged with the profit or interest. But the case is very different here, where the money is in the hands of the receiver unappropriated between 1798 and 1807, the act 38 Geo. 3. having appropriated only such of the fees as had been received previous to 1798, and he being appointed in 1799, without knowing to whom he was accountable for it, until the act 47 Geo. 3. gave him a legislative authority to pay it for the use of this fund; and my humble opinion is that he ought not to be charged with interest for the period during which the money so remained unappropriated.

And I also think it reasonable that the decree should be altered so far as respects costs. Why was not the information filed sooner? If the Att. Gen. did not sooner make the demand, it must be because he doubted whether he could make it successfully before 1807. I do not say how far the doubt might be well founded; but even after he had filed the information, and during the pendency of the suit, the surviving waiters brought their action for this money, and a question at law was made, which cannot be said to have been unfit to be tried; and we are to consider whether, under these circumstances, the Appellant is so far wrong as to be visited with costs to the other party. I think, therefore, your Lordships may safely be advised to alter the decree to the extent which I have stated,

so far as relates to interest and costs, and subject to Feb. 25, 1816. such alterations to affirm it.

Lord Redesdale. The act 38 Geo. 3. c. 86. has many clauses relating to this office and others, and it speaks of the offices of the nineteen waiters; so that it is clear that the act had in view nineteen officers of this description; and it enacts that none of these offices should be granted by patent or otherwise, *save as thereafter mentioned*. And that such of them as were vacant at the passing of the act, and the rest as they became vacant, should be abolished, *save as thereafter provided, &c.* Then we must look at what are the provisions of the act, and we find that it gives power to the Commissioners of the Customs to provide for the exercise of the duties of the offices by appointing other officers, or consolidating the offices as they should think fit, it being clear that the duties of the nineteen waiters were to be performed somehow; but whether by deputies of the waiters, or others, is left to the Commissioners. Another clause provides that the officers before mentioned should not be compelled to any other attendance on the duties of their several offices during the existing grants than before. From this it follows that the duties of the offices must be still executed; and yet that the existing officers should not be bound to more attendance and duty than before: so that it was the intent of the legislature that the surplus should not go to the surviving waiters. It is clear, therefore, that the decision of the Court of K. B. was right.

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But it still remained in suspense what was to be done with the surplus fees received after 1798. It

Feb. 25, 1816. could not be the intention to increase the allowance to the survivors, and these being consolidated fees

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THE.—INTER-
EST.—COSTS.

were all paid to the receiver, and the surplus remained undisposed of. The act 38 Geo. 3. 86. was defective therefore in not providing for what might have been easily foreseen.

So the matter stood till 1807. In the mean time Mucklow, having been appointed receiver, was called upon for the surplus fees both by the waiters and by the Commissioners, as each thought they were entitled. The act gave no authority to the Commissioners, unless with reference to some regulation of the office, which did not take place. They had no right to direct these fees to the superannuation fund, and the act gave no such direction. The survivors claimed in opposition to the Board of Customs. And thus the receiver was called upon on the one side by the Commissioners and on the other by the surviving waiters, neither of them having any clear title to the money claimed.

Then the act 47 Geo. 3. sess. 1. c. 51. was passed to supply the defect, and it was unfortunate that the object had not been sooner attended to. Now the act 47 Geo. 3. is still a general act, whereas it should have provided for the particular cases. But it does enact that the several sums of money received since the 1st July, 1798, or which at any time thereafter ought to be received for fees or emoluments of offices in the Customs, abolished or vacant, &c. should be applied in augmentation of the superannuation fund, &c.—What right then did this act give? It gave a right merely to the sums, but no right beyond that; and yet this information, which

is founded on the act, claims interest to which the Feb. 25, 1816. act gives no title.

It has been objected to the information that the merchants from whom these fees had been taken might claim them. But no such claim has been made, nor could well be made with effect; and at any rate that signifies nothing now, as the act directs the money to be applied to this fund.

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It was the receiver's duty to obey the act, and the act would be his indemnity. I therefore think the decree right as to the sums received, and as to the giving interest from the time when the receiver was in default in not paying, which could not be before the passing of the act 47 Geo. 3.

The information was then filed, and these fees were public money, for which the Attorney General might alone sue.—The fund is for the remuneration of public officers, and is therefore a public fund, though in the nature of a charity. There can be no objection therefore to the decree in principle, the only question being whether the act was to be obeyed or not.

As to the costs, that is a different question. The surviving waiters insisted upon what they conceived to be their rights. The receiver was in the nature of a stake-holder, and might fairly submit the question whether he ought to pay the surplus to them. The Court of K. B. decided that they had no right to them. The money had been paid into the Court of Exchequer, and the question at the hearing was chiefly as to the interest and costs. The information was several times amended, which was an admission that there was some foundation for the Ap-

Feb. 25, 1816. **Appellant's objections.** But the Appellant was properly charged with interest for the time during which he kept the money in his hands after the filing of the information in 1807, because then by paying the money into Court he might certainly have indemnified himself. But where there had been so much doubt it was hard upon the Appellant to say that he should pay the costs of the Crown as well as his own, and even to his own he would be entitled according to the rules of Courts of Equity if he had at first paid the money into Court. I agree therefore that the decree ought to be affirmed, subject to the proposed alterations.

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TEE.—INTER-
EST.—COSTS.

Judgment. Decree accordingly *affirmed*, with these alterations as to interest and costs.

Agent for Appellant, PALMER.
Agent for Respondent, SUDLOW.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HICKES—*Appellant*.
COOKE—*Respondent*.

Feb. 23,
March 14,
1816.

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ESCENCE A
BAR TO RE-
LIEF.

LENGTH of time, or long acquiescence in a transaction, may be a bar to relief in cases where the transaction, if impeached within a reasonable time, would be set aside. Therefore where a fee-farm grant or lease, at a fixed rent, was made of mortgaged premises by the mortgagor to the mort-

gagee, in which there was an acquiescence for nearly fifty years—though the transaction was of a nature to be set aside if impeached within a reasonable time—the House of Lords affirming the decree below, held that length of time was a bar to the relief.

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Dicente Lord Eldon (C.) that the transaction was one of that description which Courts of Equity always regarded with a great deal of jealousy.

Dicente Lord Redesdale that the only proper principle was that no contract for a beneficial interest out of the mortgaged premises, from the mortgagor to the mortgagee, where the mortgage continued, if impeached within a reasonable time, ought to stand.

THE original bill, filed in June, 1781, by the Appellant George Hickes, stated that Francis Hickes, the Appellant's grandfather, being in 1708 seized in fee simple of the lands of Cloonora in the barony of Slaverdagh and county of Tipperary, computed to contain 299 acres of profitable land, but actually containing 700 acres of land of excellent quality, in the said year 1708 mortgaged the lands to Phanuel Cooke, then of Clonellan in the county of Tipperary, in fee, to secure the repayment, with interest at 8 per cent. of a sum of 280*l*. then due from Hickes to Cooke:—that Francis Hickes soon after died, and his son and heir at law, John Hickes, became seized of the equity of redemption of the estate, and that the said John Hickes in 1721, previous to his marriage, executed articles, by which he agreed to apply his wife's portion in payment of the mortgage debt, and to settle the lands on himself and his wife for life, remainder to the issue male of their bodies:—that John Hickes neglected to register the articles, or to apply the portion in payment of the mortgage

Bill filed,
June, 1781.

1708, Hic
Appellant's
ancestor, mort-
gaged lands to
Cooke, Re-
spondent's an-
cestor, for
280*l*.

Marriage of
John, son of
Francis
Hickes, and
alleged ar-
ticles of 1721.

Alleged arti-
cles not regis-
tered.

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Debt increas-
ed to 800*l*.

John Hickes
alleged to be
a weak, indo-
lent, expen-
sive man.

Jan. 1734, the
lands mort-
gaged for the
800*l*.

May, 1734,
fee-farm grant
or lease of the
mortgaged
premises from
the mortgagor
to the mort-
gagee.

debt, but suffered a large arrear of interest to accrue thereon to the amount, as was pretended, of 520*l*.

for which the said John Hickes gave bonds to the said Phanuel Cooke, making the whole debt 800*l*. —that Phanuel Cooke died in 1733, leaving John

Cooke his heir at law, and one of his executors ; and that John Cooke, knowing that the debt was made up of interest and compound interest, and that John

Hickes was a weak, indolent, and expensive man, and fearing that part of the debt might be disputed, in November, 1733, filed a bill of foreclosure against John Hickes, but wrote to him at the same time

that if he would come and settle he would be at no expense by the bill :—that John Hickes immediately repaired to Cooke, and was prevailed upon to

execute a mortgage in fee of the lands for the whole sum of 800*l*. :—that Cooke afterwards pressed for payment, and threatened to foreclose unless still further security were given ; and that John Hickes,

being an extravagant and necessitous person, and therefore greatly in the power of Cooke, was induced to execute, by deeds of lease and release of the 3d

and 4th May, 1734, to one Otway (Cooke's brother-in-law and friend), since deceased, a fee-farm lease or

grant of the mortgaged premises, at the yearly rent of 80*l*. in trust for Cooke, as a security for the punctual payment of the interest as was pretended, and

that Cooke had ever since been in possession and accounted for the 80*l*. rent ;—that at the time of executing this lease the lands were worth 300*l*. a-

year, and at the time of filing the bill 700*l*. a-year : —that John Cooke had notice of the marriage articles of 1721 before the mortgage of 1733 :—that John

Hickes afterwards paid the greater part of the 800*l.* Feb. 23,
and died intestate, leaving three sons, Lewis, Fran- March 14,
cis, and George Hickes, the Appellant :—that Lewis 1816.

Hickes, being ignorant of the marriage articles and LONG ACQUI-
of the payment of the mortgage debt, accepted the ESCENCE A
rent with deduction of the interest of the 800*l.* till BAR TO RE-
1750, when Lewis discovered the articles, and that LIEF.
his father was only tenant for life, and that he him- Alleged pay-
self was entitled to the premises subject only to the ment of the
original mortgage of 280*l.* and threatened to com- 800*l.* not
mence a suit to set aside the subsequent mortgage, proved.
&c. but was induced to desist, and to ratify the Death of John
mortgage, and to acquiesce under the fee-farm lease Hickes, 1746.
by a loan or gift of 200*l.* from Cooke :—that Lewis Lewis Hickes
Hickes died intestate and without issue in 1769, succeeds, and
and, Francis having died in the life-time of Lewis continues to
unmarried, the Appellant, George Hickes, became receive the
entitled, and, being ignorant of the marriage articles rent of the
of 1721, and in distressed circumstances, received grant or lease.
the rent with deduction of the interest of the 800*l.* : Death of
—that in 1774 John Cooke died, leaving the Re- Lewis Hickes,
spondent, William Cooke, his heir at law and exe- 1769; Appel-
cutor, who became seized and possessed of the lands, lant succeeds,
and had never paid the rent. And the bill prayed and accepts
that the fee-farm deeds might be set aside, or de- the rent of the
creed to stand only as a security, that the lands lease or grant.
might be reconveyed freed from the mortgages and Prayer of the
fee-farm lease, &c. the marriage articles of 1721 bill, that the
established, and that Cooke might pay the arrear of fee-farm lease
rent without prejudice to the relief. &c. might be
set aside.

In the answer, filed June, 1782, it was stated that Answer,
Francis Hickes was in 1708 seized, not of the 1789.

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Hickes seized
only of part of
Cloonora.

Moiety. So
stated, but in
fact only a part
or portion.

Denial that
the lands at
the time of ex-
ecuting the
fee-farm lease
were worth
more than the
rent paid for
them.

The lands the
subject of a
family settle-
ment in
Cooke's fa-
mily.

whole but of part only of the lands of Cloonora, and that Hickes's part did not consist of more than 299 acres, which were an undivided *moiety*, and intermixed with an estate called Butler's Cloonora, and that there never had been any partition. The Respondent denied notice of the alleged marriage articles of 1721, except that he had been informed that a letter demanding money, and containing an allegation to that effect, had been sent to his grandfather in 1774, to which his grandfather, conceiving it to be a scheme fabricated in order to rob him of his property, paid no attention; and that it appeared by the family papers, that several sums had been advanced to John Hickes after the first mortgage, and previous to 1721, for which sums bonds were given, and that the Respondent believed the 520*l.* was made up of principal sums and not of arrears of interest. The Respondent denied that the lands at the time of the execution of the fee-farm lease were worth more than was paid for them, and stated that he did not believe that his grandfather John Cooke, then or at the time of the execution of the second mortgage, knew any thing of the alleged marriage articles; that he knew nothing of the loan or gift of 200*l.* to John Hickes, nor of the pretended distressed circumstances of any of the parties, and that he had refused to pay the rent to the Appellant only because the widow of John Hickes claimed dower out of the rent, and that the lands in question had been the subject of a family settlement in Cooke's family; and that he believed that the fee-farm lease to

Otway was not in trust for his grandfather John Cooke, but that his grandfather purchased the same from Otway.

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The bill was amended in 1789, and stated the additional fact, that the Appellant had in 1770 filed a bill against John Cooke, to set aside the fee farm lease, &c., and that Cooke had answered, admitting the trust; but that from poverty the Appellant had been unable to prosecute that suit further.

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Amended bill,
1789.

The Respondent, in a further answer to the original bill, said that he did not believe that a paper which had been shown him purporting to be a receipt, dated July, 1744, from John Cooke for the 800*l.* was really the receipt of John Cooke; and though it was printed with the evidence none of the witnesses spoke to it. The evidence as to the marriage articles of 1721 was very slight, being only that of an old woman, the Appellant's sister, who said her sight was so bad that she could not see the paper sufficiently to enable her to say whether she had seen it before, but that her husband had received 100*l.* from her brother Lewis, which she believed to have been due to her under the settlement. There was some evidence of the distressed circumstances of John and Lewis Hicke, and the poverty of the Appellant was clearly proved. There was no satisfactory evidence to contradict the statement in the answer that 80*l.* was a fair rent for the lands at the time of executing the grant or lease.

Marriage arti-
cles (not regis-
tered).

Poverty of the
parties (the al-
leged cause of
their so long
acquiescence
or submis-
sion).

Value of the
lands.

The cause was brought to a hearing only in December, 1807, when the bill was dismissed with Appeal.

Hearing, 1807.
Bill dismissed.
Appeal.

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costs, the Respondent undertaking not to levy them. From this decree Hickes appealed.

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Romilly and Horne (for Appellant). 1st. On the ground of oppression, and the advantage taken by the mortgagee of the distresses of the mortgagor, the decree is wrong. This appears from the nature of the transaction of the fee-farm lease. It is a conveyance of the mortgaged premises in perpetuity to the mortgagee, at an annual rent of 80*l.*; so that after deducting the interest of the 800*l.* the mortgagor has only an annuity of 40*l.*, and loses all the benefit of improvements, increased value, and other advantages of land. It is clear that this, if it had been a recent transaction, would, as between mortgagor and mortgagee, have been *prima facie* evidence of fraud. 2d. The inadequacy of price is such as to amount to evidence of fraud. They admit that the other moiety is worth 500*l.* a year. 3d. In the case of a lease for 999 years, the Court said that if an advantage is taken by such a contrivance, beyond the legal interest of the money lent, this is contrary to public policy; and cannot stand; but this is worse, as it is a lease in perpetuity. 4th. Then as to the length of time that elapsed before the transaction was impeached, that is accounted for by the poverty of the parties. The acquiescence must be voluntary, but this was merely a submission from which the parties could not escape.

*Qr. Webb v.
Rorke, 2 Scho.
Lef. 661.*

Leach and Wetherell (for Respondent). They rest now merely on the fee-farm lease of 1734.

The inadequacy of price is not proved, and it is denied in the answer. The Cloonoras, though not divided by metes and bound, are not undivided moieties, but different portions; so that though one part may now be worth 500*l.* a year, it does not follow that the other is worth 100*l.*; and is the price now any criterion of what was a proper price then? The only ground on which the transaction can be impeached is that it is utterly impossible from its nature that it can be fair. But why could not Hickes grant a fee-farm lease at that time when every prudent owner was granting them? And what difference does it make that the transaction is between mortgagor and mortgagee? The mortgagee may have it in his power to give more favourable terms, and therefore it may be more advantageous to the other party. And is this to be challenged after such a length of time and acquiescence? The bill in 1770 was dismissed for want of prosecution. The excuse is the distress of the parties; but are the rules of justice to be dispensed with on that ground?

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Romilly (in reply). The transaction being between mortgagor and mortgagee does make a great difference; because a mortgagee, proceeding against a mortgagor who cannot pay, certainly has a great advantage in such a transaction as this. The rules of justice, it is true, are the same for poor and rich. But where the question is why a claim was not prosecuted sooner, poverty is a good reason.

Lord Eldon (C.) The bill in this case was in Judgment,
March 14,
1816.

March 14,
1816.

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LIEF.

A fee-farm grant, or lease of mortgaged premises from the mortgagor to the mortgagee at a fixed annual rent, is among that description of transactions at which Courts of Equity look with a great deal of jealousy.

Ireland dismissed with costs; and I shall content myself with stating in a few words why it appears to me that the decision ought not to be disturbed now, whatever might have been done at an earlier period of the transaction. The bill states—(states the case, particularly the fee-farm grant). A transaction of this sort ought certainly to be looked at with a great deal of jealousy, and a Court of Equity does regard such transactions with a great deal of jealousy; though, if they should appear to be perfectly fair, it will not set them aside merely because they are foolish. The transaction took place in 1734, when this mortgagor and this mortgagee were, as between each other, in a situation which your Lordships may judge of when you consider that the mortgage from 280*l.* had accumulated to 800*l.*, which shows that the mortgagee had great opportunity for taking advantage of the distress of the mortgagor, a circumstance which makes Courts of Equity always look at such contracts with jealousy.

But it is not so expedient to rescind the contract when first impeached only in 1781, as it would have been if it had been impeached in 1734, after a lapse of nearly fifty years, during which the right to the remedy and the opportunity to complain existed.

Acquiescence for a great length of time is material evidence to show that a contract was fair, though it be of that kind

And there is no possibility of denying that this is material evidence in a question whether a transaction was fair, which was not impeached when the value of the subject, and the whole circumstances of the case, might have been brought forward to show the Court what was the real nature of the transac-

tion. I would not therefore advise your Lordships to alter this decree in effect; but it may be proper to make some alteration in the language, so as to affirm it in such a way as to show the necessity of looking with a great deal of jealousy at such transactions, though in the present case your Lordships think that you are bound by length of time, and on that account prevented from applying that principle. Whether that degree of jealousy is largely applied in Ireland, where these perpetual annuities are so common, the House may receive some information from another noble Lord.

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which Courts
of Equity look
at with jea-
lously.

Lord Redesdale. This case involves a very important question. It was a very common practice with mortgagees in Ireland, by procuring a lease from the mortgagor to obtain a benefit beyond the legal interest of the money. Your Lordships observe that the mortgagor, from the circumstances of control under which he stands with respect to the mortgagee, cannot deal with him as he could with other persons, and as the mortgagee can make no effectual lease without the concurrence of the mortgagor, if the mortgagor refuses to accede to the terms of the mortgage the latter may distress him so as to make it better for him to consent to a lease on unreasonable conditions than refuse to comply.

There have been cases, one of which came before * *Qr. Gubbins v. Creed, 2 Scho. Lef. 218.* Lord Clare, and another before me* when in Ireland, where advantage was taken of these circumstances, and the transaction was set aside.

In this case the transaction in 1734, for that was the date of the lease, took place very recently after

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the mortgage had been increased and the mortgagor appeared to be distressed. The lease then (it was improperly so called, as it was a conveyance by lease and release) was made but a very short time after the increase of the mortgage from 280*l.* to 800*l.* The mortgage had been so increased in January, 1734, and the lease was made in May, 1734; so that there was only the interval of the months of February, March, and April, between the transactions. The reason for taking this lease was a plausible and a very common one, namely, to secure the punctual payment of the interest; for if the mortgagee had 80*l.* rent to pay and 40*l.* interest to receive, he retained the interest and the rent was reduced to 40*l.*

A transaction of this kind, if recently impeached, ought to be set aside, as it procured for the mortgagee an advantage beyond the interest of his money, and incumbered the equity of redemption.

A transaction of this sort, if recently impeached, should be set aside; for it not only had the effect of procuring for the mortgagee an advantage beyond the legal interest of the mortgage money, but it also incumbered the equity of redemption; for the mortgagor would have nothing to sell to redeem the mortgage but the fee-farm rent. A bill of foreclosure might be filed against him, the expenses of which he would have to pay, and unless he could sell the rent to as much advantage as he could the lands without that burthen, he suffered a loss by the transaction. Then if the transaction had been recently challenged it ought to have been rescinded, on the principle that the mortgagee by this means gained an advantage beyond the interest of his mortgage money. But though the transaction was in 1734, John Hickes remained several years without impeaching it; and on the part of the Re-

spondent there was evidence to show that he was not so distressed as he was represented to be, for the evidence in the letters to Cooke shows that he was in a situation with respect to other transactions which required money (reads a letter from John Hickes, dated May, 1736, where he spoke of having taken a new farm, &c.). Now this was two years after the transaction, and is evidence that he was not in very great distress; and there are other letters affording similar evidence.

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LIEF.

Then, on the death of John, Lewis succeeded, and he dealt with this as John had done, and Lewis died in 1769, so that neither John nor Lewis complained of this during a period of 35 years; and thus the matter stood on the death of Lewis when the Appellant succeeded, Francis having previously died without issue.

It should seem that the rent had not been very regularly paid after the death of Lewis Hickes. But the transaction stood unimpeached till June, 1781, a period of nearly 50 years, during which it was suffered to rest. As I said before, if this transaction had been earlier challenged, it was one which ought not to have stood. But when I consider the lapse of time, and the prodigious change in the value of landed property which has in the interval taken place, I doubt whether that justice could now be done in rescinding the transaction which would have been done if it had been recently challenged. The family of Mr. Cooke must have considered this property as their own; they must have dealt with it as such, and for any thing that appears might have improved it as such. It is besides, probably,

The change which in a long course of time takes place in the value and circumstances of property, and the consequent difficulty or impossibility of doing that justice between parties which may be

March 14,
1816.

LONG ACQUI-
ESCENCE A
BAR TO RE-
LIEF.

done where
transactions
are recently
challenged, are
reasons why
length of time
is a bar to the
relief in cases
where the
transactions, if
early im-
peached, are
such as ought
to be set aside.

The proper
principle is,
that no con-
tract between
mortgagor and
mortgagee for
a beneficial in-
terest to the
latter out of
the mortgaged
premises,
where the
mortgage con-
tinues, if im-
peached
within a rea-
sonable time,
ought to stand.

so mixed with Mr. Cooke's own part of Cloonora that it cannot be distinguished; and it appears to have been the subject of a family settlement in Cooke's family.

I think then that the bill was properly dismissed. But it does appear fit that your Lordships should not be content with a bare affirmance of the decree, but that you should state the principles upon which that affirmance rests. The decree is rather of a particular nature; for though it dismisses the bill with costs, it is with a sort of undertaking that the payment of the costs should not be enforced: so that it appears the Court below had considerable hesitation in dismissing the bill. Your Lordships, in affirming the decree, will be anxious not to injure the principle; and the only proper principle is this, that, although a mortgagee may, without imputation, contract for the purchase or release of the equity of redemption, no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease) where the mortgage continues, ought to stand, if impeached within a reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction. If he purchases the equity of redemption, there can be no objection to that sort of contract. But the mortgagor holding it still, and the property being reduced in value to a fee-farm rent, so that by the incumbrance on the reversion he is disabled from redeeming so well as if that had not been done, and he being liable to have a bill of foreclosure filed against him the expenses of which he must pay, and to an action for the mortgage

money, such a transaction ought not to stand. March 14, 1816.
 Your Lordships therefore will show a strict adherence to the principle, and that nothing here but length of time and acquiescence for nearly fifty years by the father and his son Lewis Hickes, and also by the Appellant,—that nothing but this—induces you to affirm the decree.

LONG ACQUI-
 ESCENCE A
 BAR TO RE-
 LIEF.

Ground of the
 judgment
 lapse of time
 before the
 transaction
 was im-
 peached.

Decree *affirmed*, solely on the ground of the long acquiescence,

Agent for Appellant, BEETHAM.
 Agent for Respondent, LANE.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER

MORGAN and others—*Appellants*.

LEWES (SIR WATKIN) and his } *Respondents*.
 Daughter. }

ATTORNEY and agent advances money to his client and principal in various sums and at different periods, from 1773 to 1778, taking securities and getting accounts settled. The transactions impeached in 1789, and decree of the Court below and orders of the Lords proceeding upon its principle, that the settled accounts shall be opened and the whole transactions sifted; and that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced and proved to be so by other evidence than the securities and settlement of accounts.

March 15, 18, 20; April 1, 1816.

ACCOUNT.—
 ATTORNEY
 AND CLIENT.

March 15, 18,
20; April 1,
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

But as in the case of accounts in some sense settled, and a considerable period elapsing before they were impeached, vouchers might have been delivered up or lost, the oath of the party admitted as evidence as to the existence and import of such vouchers.

Attorney procures money on mortgage for his client from other clients, and gives up to the client mortgagor a bond, obtained from that client in respect of separate transactions between themselves, as part consideration of the mortgage. A separate account ordered as to the mortgage transaction in order to clear the estates, the attorney being in possession as agent for the mortgagees, and the account confined to the money actually advanced by the clients the mortgagees, and the mortgage security cut down, as to the other alleged part of the consideration, which is referred to a general account between the attorney and the client the mortgagor.

The attorney not allowed to take timber felled on the mortgaged estates in execution for his private debt, the timber being part of the security of the mortgagees, and the produce goes in discharge of the mortgage account. (*Vide* 3 Anst. 769. *Vide* also *Cane v. Lord Allen*, ante, vol. ii. 289. and *Vaughan v. Lloyd* cited in *Wharton v. May*, 5 Ves. 48.)

THIS is a case depending on the principles on which Courts of Equity proceed in directing accounts between attorney and client, where the attorney has been dealing adversely with the client during the continuance of that relation.

1773, Morgan
offers to pro-
cure for Lewes
money on
mortgage.

Sir Watkin Lewes, being in 1773 seized of estates in right of his wife, in the counties of Glamorgan, Carmarthen, and Pembroke, became acquainted with John Morgan an attorney, who promised to procure for him money at four per cent. on mortgage of the estates, chiefly for the purpose of paying off a then existing mortgage at five per cent. to a Dr. Kent. With a view to this arrangement a new marriage settlement of the estates was made, in

Marriage set-
tlement. Term
of 500 years
to raise 12000*l*.

which there was a term of 500 years to the use of March 15, 18, 20; April 1, 1816. trustees, George Morgan, and James Morgan, the latter the brother of John Morgan, in trust to raise 12000*l.* upon security of the estates, 5000*l.* thereof to be applied in paying off Kent's mortgage, and the remainder to be paid to Sir W. Lewes. That project of mortgage however came to nothing; but John Morgan having married in 1775, he offered Sir W. Lewes on mortgage at four per cent. some money settled on his own marriage, in trust to pay the interest to himself for life, then to his wife if she survived, and after the death of both to pay the principal and interest among the children of the marriage, and in default of children to himself absolutely, and by the death of the wife without children he became in fact entitled absolutely. Farrer his father-in-law, and James Morgan his brother, were the trustees in that settlement, and at the suggestion of John Morgan, Lewes consented that James Morgan should be removed from being a trustee of the 500 years' term, under Lewes's settlement, and that Chardin Morgan, another brother of John Morgan, should be made trustee in his stead.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Morgan's marriage settlement.

Trustees. One brother of Morgan a trustee in Lewes's settlement, another a trustee in Morgan's settlement.

By an indenture dated June 2, 1775, the 500 years' term in the estates was assigned in mortgage to Farrer and James Morgan for 6,610*l.* and by another indenture of the same date, it having been agreed that a receiver should be appointed, the mortgaged premises were demised to John Morgan for sixty-one years, if he should so long live, without impeachment of waste, upon trust that the said John Morgan should, during the term, or until the

First mortgage June 2, 1775, 6,610*l.*

Morgan appointed receiver upon Lewes's estates.

March 15, 18, money should be paid, receive the rents, &c., and
20; April 1, dispose of the same in payment of the interest of
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Power as to
tenants, &c.

the sum borrowed, and of a salary of 40*l.* to himself; the surplus to be paid to Sir Watkin Lewes or any who should be entitled, and the term of sixty-one years to be determined on payment of the 6,610*l.* and interest. And John Morgan was by this indenture empowered “to remove or put out all or “any of the tenants or occupiers of the said hereditaments and premises, and to let and demise “the said premises, or any part thereof, unto such “persons, and upon such terms and conditions, “and in such manner as, with the consent and “approbation of the said William Farrer and “James Morgan, &c. the said John Morgan should “think proper.”

Second mortgage, April 2,
1776, 1,390*l.*

By a deed poll, April 2, 1776, indorsed on the indenture of assignment of June 2, 1775, the premises were mortgaged for a farther sum of 1,390*l.* alleged to have been advanced by Farrer and J. Morgan, making their alleged mortgage money 8,000*l.*

Third mortgage, April 3,
1776, 4,000*l.*

By another indenture of assignment of April 3, 1776, the estates were mortgaged during the residue of the term of 500 years to Henry Wilder, to secure a sum of 4,000*l.* advanced by the said Wilder; and by another deed of the same date, Lewes covenanted to allow Morgan a farther salary of 20*l.* a year.

In the mortgage transactions John Morgan acts as agent for mortgagor and mortgagees.

In these transactions John Morgan acted as attorney for both mortgagor and mortgagees; and whatever money was actually paid by the mortgagees was paid into the hands of Morgan, as the confidential agent and banker (as he was called) of Sir

Watkin Lewes ; and as there were distinct dealings between John Morgan himself individually and his client Lewes, these matters came to be the subject of two distinct accounts, the mortgage account and general account.

March 15, 18,
20; April 1,
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

With respect to the first mortgage, the sum of 6,610*l.* stated as the consideration, was made up of a sum of 4,209*l.* 7*s.* 1*d.* admitted to have been advanced by the trustees Farrer and James Morgan on the mortgage account, and of a bond for 2,400*l.* executed by Lewes to Cardin Morgan for moneys alleged to have been previously advanced. As to this sum of 2,400*l.*, it was stated by John Morgan, in his answer to the bill hereinafter mentioned, that the several sums of 500*l.*, 220*l.*, 120*l.*, and 950*l.*, for each of which bonds were given to Chardin Morgan, had been advanced at different periods before the 18th November, 1774, on which day the account relative to these sums was settled ; and that other sums were subsequently advanced to Lewes through the hands of John Morgan before February 28, 1775, on which day the account relative to all these sums was again settled, and a bond given by Lewes to Chardin Morgan for the amount of the whole, being 2,400*l.* But it appeared that though Morgan had included that sum in the mortgage accounts, the sums composing it, or whatever part of them were actually advanced, had been advanced by Chardin or John Morgan to Lewes without reference to the mortgage, and that the whole of the moneys mentioned in the securities had not always been really advanced at the time when these securities were given and the accounts settled ; for

Two distinct
accounts.
Consideration
of the first
mortgage.

Accounts
settled.

March 15, 18, instance, when the account was settled, and the
20; April 1, bond given for this 2,400*l.* on February 28, 1775,
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Consideration
of second
mortgage.

a sum of 210*l.* then remained to be paid to Lewes
to make up that sum.

The consideration of 1,300*l.* for the mortgage
deed April 2, 1776, was stated in John Morgan's
answer to a bill afterwards filed in the Exchequer;
to be so much money advanced to him as Agent
or Attorney for Sir Watkin Lewes by Farrer and
James Morgan, before the execution of the deed.
But upon investigation, it clearly appeared that
190*l.* of this sum was advanced by John Morgan
himself; and there was no sufficient evidence that
any part of it had been advanced on the mortgage
accounts.

Consideration
for third mort-
gage.

The consideration (4,000*l.*) for the third mortgage
April 3, 1766, appeared to have been actually ad-
vanced; so that the sums actually advanced on
the mortgage account amounted together to 8,200*l.*
and a fraction; and in the course of the exceptions
and proceedings below, it was urged as an objection
to the allowance of the whole of that sum, that the
whole had not been applied by Morgan to Lewes's
use.

After the execution of these securities Morgan
delivered an account to Lewes, giving him credit
for the whole sum of 12,000*l.* as advanced on the
mortgages, and discharging himself by the pay-
ment of Kent's mortgage and of Chardin Morgan's
bond for 2,400*l.*, by bills of costs due to himself
for business done for Lewes, amounting to upwards
of 800*l.*, and by various other sums applied by
him to the use of Lewes.

This account was settled, and allowed by Lewes, March 15, 18, 20; April 1, 1816.
on the 24th of February, 1777.

It is unnecessary for the purposes of the present appeal to state the particulars of the various other transactions between Morgan and Lewes, the sums advanced or alleged to have been advanced by Morgan to Lewes, and the securities taken. But it ought to be noticed, that it was hardly pretended by Morgan that the whole sums mentioned in these securities were actually advanced to Lewes at the time they were executed, but only that the whole had been applied then or afterwards to Lewes's use, and it became a question whether the settled accounts ought not to be opened and each of the items separately investigated, though the vouchers had been delivered up, or alleged to have been delivered at the time of settling; and whether the securities themselves ought to be admitted as evidence of the actual advance of the sums mentioned in them. Neither Morgan nor Lewes, it should be observed, had kept regular accounts of the dealings and transactions between them.

In 1778 several proceedings at law and in equity were commenced, and judgments obtained, by Morgan against Lewes on his securities, and among others, actions of ejectment were brought on the several demises of William Farrer and James Morgan the mortgagees, against the tenants of the Glamorgan and Carmarthen estates, in respect of the tenements comprised in the mortgages, and also of tenements not so comprised; and in 1779 John Morgan, as attorney for the mortgagees, was put in possession of the estates, and continued in the pos-

ACCOUNT.—
ATTORNEY
AND CLIENT.
Account settled.

The sums mentioned in the securities not always fully advanced at time the accounts were settled, and the securities were executed.

1778. Proceedings at law and in equity by Morgan against Lewes. Judgments obtained. Ejectment by mortgagees, and John Morgan as their agent put in possession.

March 15, 18, session till 1798 when a receiver was appointed by 20; April 1, the Court of Exchequer.
1816.

ACCOUNT—
ATTORNEY
AND CLIENT. Sir W. Lewes had previously felled some timber on the estates for the purpose of raising money, which timber Morgan took in execution by virtue of writs of *Fi. Fa.* issuing upon judgments obtained for moneys due to himself personally and individually. Timber taken in execution by John Morgan for his private debt.

In the course of these proceedings two references to arbitrators took place, one to Messrs. Holt and Parry, and another to Mr. Blake, solicitors; and afterwards set aside, and second (Blake's) two awards were made (the first of them on the principle of settled accounts), which came to nothing. Lewes at length got another solicitor to undertake his cause and procure money to settle with Morgan, and applied to Morgan for an account. Morgan returned for answer that he calculated the money due on all the securities to amount to near 17,000*l.*, but that 16,000*l.* would be accepted if paid as a gross sum to end disputes, after which he would furnish an account and abstract. Lewes refused to give a gross sum without an account, and required an account stated in the usual manner, which was refused.

1783. Bill in Exchequer by Lewes.

Prayer of it. General account.

Mortgage account.

Lewes therefore, in 1783, filed his bill in the Exchequer against the mortgagees, and all proper parties, of which the prayer was of this nature; that a general account might be taken of all dealings and transactions between Lewes and the defendants; and an account of the rents of Lewes's estates received by the defendants or any of them; that so much of the several mortgage sums of 6,610*l.* 1,300*l.* and 4,000*l.* as should appear to have come to the hands of George Morgan

might be answered by him accordingly, and so much of them as should appear to have come to the hands of the deceased Chardin Morgan in his life time might be answered out of his assets by his personal representative James Morgan, or that James Morgan should set out an account of Chardin's personal estate; that the award made by Parry and Holt might be declared void and set aside; that John Morgan might be compelled to make out a proper account of fees and disbursements, and that the same might be referred to the master to be taxed; *and that Lewes on paying what should be found due to the said defendants on the said several accounts might be let in to redeem his estates*; that a receiver might be appointed till redemption; and that an injunction might issue to stay proceedings at law, and restrain the selling of timber cut down, and the cutting down more, or committing waste; and that the remaining timber might be sold for Lewes's benefit.

so March 15, 18,
20; April 1,
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

These words
considered as
applying only
to the mort-
gage accounts.

The Court on 2d July, 1796, decreed an account of all dealings and transactions between Lewes and John Morgan;—and an account of moneys received by John Morgan as agent for Lewes, and for the mortgagees, Farrer and James Morgan, and how the same had been applied; that Dep. Rem. should tax John Morgan's bills of costs; an account of rents and profits of the mortgaged estates, and of timber felled thereon, and on the estates not in mortgage received by John Morgan or any person or persons by his order or for his use, or which without his wilful default, &c.; an account of the rents and profits of Lewes's estates not in

Decree, July
2, 1796.

General ac-
count.

Mortgage ac-
count.

March 16, 18, mortgage received by John Morgan, &c.; that all parties should have just allowances, and be examined on interrogatories touching the said several

accounts; that all parties should produce on oath, if required, all books, papers, deeds, evidences, and vouchers in their custody, &c.; and it was

ACCOUNT.
ATTORNEY
AND CLIENT.

Directions.

Where vouchers delivered up or lost, oath of the party admitted as to their existence and import.

Liberty to make a separate report.

further, &c. decreed, that if, in taking the accounts and taxing the costs, it should appear to the Deputy Remembrancer that any one or more voucher or vouchers, in support of any one or more article or articles in the said accounts, and in the bills of costs of the said John Morgan, was then or were then lost, and could not be found, then John Morgan was required to make oath before one of the Barons, or a Commissioner duly authorised to take affidavits therein, that such voucher or vouchers did theretofore exist, and of the contents or purport of such voucher or vouchers, and that the same had been delivered up to Sir W. Lewes; and the Dep. Rem. was armed with a commission for the examination of these matters; and if any special matter should arise, the Dep. Rem. had liberty to state the same by special or separate report; and the consideration of interest and other directions were reserved until the Dep. Rem. should have made his general report; and parties to be at liberty to apply to the Court as there should be occasion.

After some proceedings before the Dep. Rem. Lewes applied to the Court for an order for a separate report as to the mortgage transactions. And by an order of June 20, 1801, the Dep. Rem. was directed to make a separate report of all dealings

Order, June 20, 1801, for separate report

and transactions between the said Sir W. Lewes and John Morgan as far as related to the moneys actually received and paid on account of the mortgages and judgments in the bill mentioned: and also of all and every the sum and sums of money received by Morgan as agent for Lewes, and for the Defendants the mortgagees, and when and how such sum and sums of money was or were applied to their account; and of the rents and profits of the mortgaged estates; and of the timber which had been felled thereon, and on the estates not in mortgage received by John Morgan, &c.; and also of the rents and profits of the estates not in mortgage of which John Morgan was or had been in possession, &c.; and the Dep. Rem. should tax the costs of the mortgagees in the ejectments, and also the costs of the judgments, and state the amount in his separate report.

March 15, 18,
20; April 1,
1816.

ACCOUNT,—
ATTORNEY
AND CLIENT:
on mortgage
account, in-
cluding the
judgments.
(Vide Lord
Redesdale's
speech in judg-
ment, post.)

It was represented on behalf of Lewes, that the Court must by its decree have meant that the securities themselves should not be admitted as evidence of the money actually advanced to Lewes, or Morgan as his agent, but the Deputy Remembrancer understanding it differently made his separate report on July 16, 1802, drawn upon the principle that the bonds and other securities were evidence of the money actually advanced and paid on account of the mortgages and of the judgments, and accordingly that the 2,400*l.* formed part of the consideration for the first mortgage, and that the 12,000*l.* had been advanced on the mortgages, and that of the total sums for which judgment had been entered up, those

July 16, 1802,
first separate
report; pro-
ceeding on
the principle
that the secu-
rities were
evidence of
the demands.

March 15, 18, particular sums, for which bonds or other securities
20; April 1, were given had been actually paid.
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Exceptions by
Lewes on the
principle that
the securities
were not evi-
dence of actual
advance.

Mortgages
had nothing to
do with the
application.

Exceptions
over-ruled,
and report
confirmed,
Feb. 9, 1804.
Appeal, order

To this report Lewes took several exceptions; five of them, which were the only exceptions connected with this appeal, proceeding on the principle that the securities were not evidence of the moneys actually advanced, and objecting to the report as to the 2,400*l.* on the ground that, the bonds being out of the question as evidence, the several sums mentioned as making up this sum of 2,400*l.* never were advanced at all to Lewes, or that if they were, they had been advanced by John Morgan himself on a general account, and ought to have made no part of the particular account directed by the decretal order of 20th June, 1801, which was confined to moneys actually advanced on the mortgage and judgment accounts. On the same principle the exceptions objected to the statement of the advance of the 1,300*l.* on the mortgage account, there being no evidence, except the existence of certain bonds for 1,200*l.* of the advance of that sum, which bonds ought not to be taken as evidence of actual advance. And it was insisted that the Dep. Rem. ought to have certified that only 8,209*l.* 7*s.* 1*d.* had been received by Morgan, as Lewes's agent, on the mortgage account; and that Morgan had applied only 768*l.* 5*s.* 6*d.* to Lewes's use, and that the balance, 528*l.* 1*s.* 7*d.* ought to be carried to the general account.

The Court of Exchequer by decretal order of the 9th Feb. 1804, overruled the exceptions and confirmed the report.

Lewes having appealed from this order to the

House of Lords, their Lordships by order 9th Feb. March 15, 18, 1807, in substance reversed the order of the Court 20; April 1, 1816. of Exchequer, overruling the exceptions and confirming the report; and then proceeding upon the principle of a separate account, and that the securities were not to be taken as evidence of the actual advance of the sums for which they were given, the order directed that the Dep. Rem. should review his report, and particularly inquire what sums of money were really advanced to Lewes, as and for the consideration of the several bonds alleged to be consolidated by the 2,400*l.* bond, and of the several other securities mentioned.

ACCOUNT.—
ATTORNEY
AND CLIENT.
of the Lords,
1807, reversing the above order of Court of Exchequer.
This inquiry directed only with a view to the separate report and mortgage account, and on the principle that the securities were not to be taken as evidence of actual advance, and that the pretended settled accounts were not to be taken as such.

The order of the Lords being made an order of the Court of Exchequer, and the Dep. Rem. having been ordered to review his report accordingly, other reports and orders were made on the principle, of course, of the order of the Lords, that the securities were not to be taken as evidence of the demands mentioned in them, and that the accounts were not to be taken as settled accounts, the Dep. Rem. however, still finding upon other evidence, that the several sums mentioned in his schedules were actually advanced in whole or in part consideration of the several bonds consolidated by the bond for 2,400*l.* and that the 2,400*l.* was by consent, on delivering up the bond, made part of the consideration for the mortgage, and generally that the whole sum of 12,000*l.* had been advanced on the mortgage account.

In consequence of an order and reference back of May 24, 1810, the Dep. Rem. by report of June Report, 1811, 25, 1811, stated, that a sum of 500*l.* had been actu-

March 15, 18, ally advanced in one gross sum as the consideration for a bond to that amount, and that the other sums mentioned in the schedules had been actually advanced, but not as the consideration for the other bonds consolidated by the bond for 2,400*l.* neither the sums nor dates of advance corresponding with the securities; that the 2,400*l.* was by consent made part of the consideration for the first mortgage; that John Morgan had out of his own moneys advanced 12*s.* 11*d.* to make up the consideration of the first mortgage, and 190*l.* to make up the consideration for the second mortgage, and that the 2,400*l.* and these other small sums being deducted, the sum of 9,409*l.* 7*s.* 1*d.* was the only money actually advanced by the mortgagees to Lewes or his agent.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Exceptions, by
Lewes.

“Out of Morgan’s proper moneys.”

It seems to signify nothing out of what fund.

To this report Lewes took five exceptions. The first was, that the Dep. Rem. had certified, that, according to the evidence before him, the sum of 500*l.* had been advanced as the consideration for the bond in the report mentioned, whereas he ought to have certified that there was no evidence before him that the money had ever been really advanced by Morgan to Lewes, out of Morgan’s proper moneys, as and for the consideration of the bond. The second exception objected to the statement that the delivering up of the 2,400*l.* was by consent of Lewes admitted as part consideration of the first mortgage, the Dep. Rem. not having been directed to give any opinion as to that point. The third exception was, that the Dep. Rem. ought to have deducted the whole alleged consideration for the second mortgage, and to have found that 8,209*l.* 7*s.* 1*d.* constituted the total amount of money advanced on the

mortgage account. The fourth exception objected to the report, inasmuch as it stated that the whole sum of 12,000*l.* had been applied by Morgan to Lewes's use, whereas it ought to have stated, as alleged in the exception, that of the 8,209*l.* 7*s.* 1*d.* mortgage moneys, only 7681*l.* 5*s.* 6*d.* had been applied by Morgan to Lewes's use, and that this latter sum was the only money due from Lewes on the mortgage account. The fifth exception related to certain alleged omissions in the report not necessary to be stated.

March 15, 18,
20; April 1,
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.
Mortgagees
have nothing
to do with the
application.

Three exceptions were also taken by Morgan to this report, insisting that the Dep. Rem. ought to have found that the several sums were advanced as the consideration for the bonds consolidated by the 2,400*l.* bond, and that farther evidence had been given that the 2,400*l.*, and the delivering it up, was part of the consideration of the first mortgage.

The cause coming on to be heard on the report and exceptions, the Court by order of July 5, 1813, decreed that Lewes's four first exceptions be allowed, and the fifth overruled; and that all the Defendant's exceptions be overruled; and that the Dep. Rem. should review his report accordingly, and compute interest on the 8,209*l.* 7*s.* 1*d.* principal mortgage money. And it was farther directed that he should take an account of the rents and profits of Lewes's estates, in mortgage or not in mortgage, received by Morgan or the mortgagees, and also an account of money received by them, or any of them, for timber cut down on the estates, and set off these receipts against the principal and interest of the mortgage money. And the usual directions in

Order, July 5,
1813, allow-
ing Lewes's
four first ex-
ceptions, &c.

Directions.

March 15, 18, taking such accounts were given. And it was
20; April 1, ordered that the Dep. Rem. should be at liberty to
1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

proceed *de die in diem*, and that the cause should be continued in the paper of causes till the coming in of the report, until which time farther directions were reserved. From this decretal order the Defendants appealed.

Appeal.

It was contended for the Appellants, John Morgan and the mortgagees, that it was manifest from the prayer of the bill, that Lewes's claim to relief, by being let into possession of his estates, was founded on his paying the whole of the moneys due to John Morgan personally, as well as the money due to the mortgagees, or to John Morgan as their agent, and that such was the meaning of the original decree; and that the Court by that decree did not mean to exclude the admission of the securities as evidence of the advance of the money stated as the consideration for them, and that the settled accounts ought to be taken as such: and that the whole of the 12,000*l.* ought to be taken as having been advanced on the mortgages. An objection was also taken to the last decretal order on the point of form, that, on a hearing on exceptions, farther and distinct directions had been given.

On the other hand it was contended that it was clearly meant by the Court, that two separate accounts, the mortgage account and general account, should be taken; and that the order for a separate report on the mortgage account proceeded on that ground; that it was also manifestly meant that the securities themselves should not be taken as evidence of the advance of the moneys stated as the

consideration for them, and that the accounts pur-
 -porting to be settled should not be taken as settled
 accounts. And that as to the point of form, the
 directions were conformable to the practice of the
 Court of Exchequer.

March 15, 18,
 20; April 1,
 1816.

ACCOUNT.—
 ATTORNEY
 AND CLIENT.

Mr Leach and *Mr. Roupell* for the Appellants ;
Sir S. Romilly and *Mr. Garrett* for the Respondents.

In the course of the hearing the Lord Chancellor
 said: The court of Exchequer, in the decree of
 1796, seems to have proceeded on the principle in ^{5 Ves. 48.}
 the case of Vaughan and Lloyd, and to have
 thought that as Morgan took securities as he chose,
 and advanced money as he chose, the transactions
 ought to be fully sifted. But at the same time, as
 the transactions were rather late in being impeached,
 and as the accounts had been in some sense settled,
 they allowed Morgan's affidavit of the existence and
 import of such vouchers as he had delivered up.
 The principle in Vaughan and Lloyd is this, that
 where one acts as agent for another on the one side,
 and for himself on the other, on account of the
 control which a man of business may have over his
 client, the Court requires that he should make the
 transaction extremely clear, and throws upon him
 that burthen of proof, which, in ordinary cases,
 would be on the other party.

Vid. Cane v.
 Lord Allen.
ante, vol. ii.
 289.

Lord Eldon. The recollection I have of this
 cause, in which I was Counsel, enables me to re-
 present in substance that Morgan was a middle
 man between the mortgagor and the mortgagees,

April 1, 1816.
 Judgment.

April 1, 1816. and also the separate agent of Sir W. Lewes; and I

ACCOUNT.—

ATTORNEY

AND CLIENT.

Prayer of bill

not adapted to

settled ac-

counts.

Decree, July

2, 1796:

meaning of it.

remember also that there were two distinct accounts to be taken, and your Lordships will perceive that the prayer of the bill is adapted not to settled accounts, but goes to all dealings and transactions between the parties; and this accounts for the decree of the Court of Exchequer, and the order made in this House in my absence. In mak-

ing this decree, though it is not expressed in the most accurate language, it could never have been the object that, in taking the accounts, the sums stated in the mortgage securities should be considered as having been actually advanced, or that the sums stated in the bonds as the consideration for them were to be taken as having been actually advanced, and as actually due; or that, looking upon these as settled accounts, so much was due as appeared to be due upon these accounts. Such of your Lordships as are familiar with proceedings in Courts of Equity must know, that if that had been the meaning of the Court, the decree would have been framed in a different manner, and you would have heard of liberty to surcharge and falsify, and of an account under such a mortgage and such a bond, to such an amount, and of such a date, &c. And I know that it was the object of Sir W. Lewes to have the whole of these accounts opened up and investigated, relying on the principle in the case of Vaughan and Lloyd, where the Court of Chancery, and with great justice in my opinion, acted on the principle that, where an Attorney advances money to his client, tendering it of his own accord, and exacting security, he

Vaughan v.
Lloyd. Cor.
Thurlow,
1781, cited in
5 Ves. 48.

may be called upon to show the actual advance of ^{April 1, 1816.} the money by other evidence than the securities themselves. I do not wish to reflect harshly on Morgan; but it is a principle of justice that an Attorney so dealing with his client, and acting both for himself and his client, should be bound to show that he acted as well for his client as he did for himself.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Attorney dealing with his client, bound to show that he acted as much for the interest of his client as for his own.

Decree, July 2, 1796.

The decree was in these terms :—“ that it should “ be referred, &c. to take an account of all dealings and transactions between the said Sir Watkin “ Lewes and John Morgan.” That is one account. But that is not taken, and still remains to be taken. “ And also an account of all, &c. sums of money “ received by the said John Morgan as agent to “ the said Sir Watkin Lewes, and also the Defendants, the mortgagees; and when and how “ such sum or sums was or were paid, or applied “ to their account respectively;” and then it was ordered that Morgan’s costs should be taxed, and that an account should be taken of the rents and profits of the mortgaged estates, and of the timber felled thereon, and on the estates not in mortgage, received by Morgan, &c.; and of the rents and profits of Lewes’s estates, not in mortgage, of which Morgan was in possession, received by Morgan, &c. &c. Directions were given for the production of books, papers, and vouchers; and then, from the length of time that had elapsed, and many of the accounts being in some sense of the word settled, I recollect it was pressed on the Court on Morgan’s behalf, that the vouchers for many of the articles in the accounts had been given up or lost, and the

Attorney advances money to client, and accounts settled between them. The settled accounts opened.

April 1, 1816. Court therefore ordered, "that if it should appear
 ACCOUNT.—
 ATTORNEY
 AND CLIENT.
 though not
 challenged for
 a great length
 of time, but
 as vouchers
 might have
 been given up
 or lost. Oath
 of the party
 admitted as to
 existence and
 purport of
 such vouchers. "
 "to the Deputy Remembrancer that any one or
 "more voucher or vouchers, in support of any one
 "or more article or articles in the said accounts,
 "and in the said bill of costs of the said John
 "Morgan, was then or were then lost, and could
 "not to be found; then the said Morgan was thereby
 "required to make oath before one of the Barons,
 "or a commissioner duly authorised to take affi-
 "davits therein, that such voucher or vouchers did
 "theretofore exist, and of the contents or purport
 "of such voucher or vouchers, and that the same
 "had been delivered up to the said Sir Watkin
 "Lewes, &c."

Decree direct-
 ed two ac-
 counts.

Now whatever may be said as to the language of the decree, the order subsequently made in this House made it mean this; that a general account should be taken of all dealings and transactions between Morgan and Lewes; and another account as to the mortgages where Morgan was acting as Solicitor for mortgagor and mortgagees. The decree is not at all adapted to the ordinary relief in cases of redemption, but goes to all dealings and transactions between the parties. What may be disallowed, however, in the account between the mortgagor and mortgagees may yet be allowed in the account between John Morgan and Sir W. Lewes. It is important in the first place to clear the mortgage accounts, and then the general accounts may be taken; and I cannot help thinking that this must have been the object of the Court of Exchequer in calling for this separate report, which does not appear to me to go to the general account,

but only orders a separate report of all dealings and transactions, so far as relates to this subject of the mortgage account, and that the general account therefore still remains to be taken. The separate report goes also to the judgments, and there is no exception to it in that respect.

Then this House made this order (*reads it, vide ante*). Now on this I have to observe, that it is an order which has no reference to the general account, and whatever becomes of this 2,400*l.*, this order merely relates to whatever part of it is to be carried to the account under the separate report, and not to what might be due under the account of the general dealings and transactions. Then the order proceeded on the ground that the securities were not to be taken as evidence of the actual advance of the money stated as the consideration for them, and such an order could not have been made unless the matter had been so understood; for if the accounts were to be taken upon these bonds as bonds, it would have been so directed. But there is hardly one of the accounts that do not falsify the bonds, and the instruments being so falsified cannot be admitted as evidence of the demand.

Your Lordships will recollect that it was argued, that this last decretal order of the Court of Exchequer was wrong in giving the directions. But I do not think that objection well founded, the hearing being on exceptions to the separate report, and the directions relating to that only. There is no direction as to the judgments; but I do not think that they form a necessary part of this account.

Let it be observed that all we are doing now is,

April 1, 1816.
ACCOUNT.—
ATTORNEY
AND CLIENT.

Order of the
House of
Lords, 1807;
meaning of it.

Objection in
point of form
not well
founded.

April 1, 1816. disallowing these sums as items in the mortgage account ; and it does not follow that the sums may not still be found due, though not on this account. The Court of Exchequer and this House have said that, as it was pretended that this 2,400*l.* was a charge on the estates, there ought to be an inquiry as to how and when it was paid ; and if it was not paid as represented, this House was opinion that, though it might be brought into the general account of all dealings and transactions, it was not to be considered as one of the items in this separate mortgage account. Then I say that no prejudice is done to Morgan as to this 2,400*l.*, or as to the judgments ; for if the money was advanced at any time, justice may be done in the general account.

Morgan not allowed to take the timber for his own private debt.

With respect to the timber, if the mortgagee is in possession he must account for the timber felled on the estates. The mortgagor cannot cut timber, as he thereby lessens the security of the mortgagee ; and Sir W. Lewes could not enter without being a trespasser. Then Morgan being solicitor for mortgagor and mortgagee, and a sort of middle-man between the two, is he to turn himself into a creditor of Sir W. Lewes so as to take the timber for his own private debt ? It is not to be endured. In my judgment, therefore, the decretal order is in substance right, and may be affirmed with some alterations in the exceptions and directions, which will be easily made, if we agree in the general view of the case.

Lord Redesdale. The understanding which the House had of the case, when it made the order of 1807, was clearly what the noble Lord has ex-

pressed ; and this is conformable to the principles of Equity recognized in a similar case. Morgan acted in two characters, being employed by Lewes both as solicitor and general agent ; and the chief question arose upon a principle particularly applicable to attorney and client. If A. lends to B. 1,000*l*. for instance, actually advancing the money, and takes a bond, there is an end of the transaction so far, and the bond is the security for and evidence of the debt. If A. advances money to the agent of B. and takes the security of B., his security is the evidence of his debt, and he has no concern with the transactions between B. and his agent. If a banker advances to one 1,000*l*. on bond in this way, that he carries it to the credit of the borrower instantly to be drawn for as money which is his cash as much as any other part of his cash, the bond is evidence of the debt, the subsequent payments being items in the general accounts. But if an agent obtains a bond from his principal by a misrepresentation, then, as the nature of the dealings are not the same, the bond cannot be produced as evidence of the debt. Then in the case of an attorney who is both agent and adviser he is liable to a more strict rule, and every shilling must be proved, or the client is bound for nothing. That was the situation in which Morgan and Lewes stood.

The mortgagees having advanced the money to John Morgan as agent for Lewes, they had nothing to do with the subsequent application of the money, whether it was applied to the use of Lewes or not ; and I say that, because in the language of one of the exceptions some doubt is expressed whether it

April 1, 1816.
ACCOUNT.—
ATTORNEY
AND CLIENT.

Attorney and
Client.
Principal and
Agent.

If agent obtains a bond from his principal by misrepresentation the bond is not evidence of the debt ; and an attorney being both agent and adviser is liable to a more strict rule.

The mortgagees, having advanced the money to the agent of the mortgagor, had nothing to do with subsequent application.

April 1, 1816.

ACCOUNT.—
ATTORNEY
AND CLIENT.

was all applied to the use of Lewes. That may be the fact, and it may be a material question as between Morgan and Lewes. But the trustees are entitled to have 8,209*l.* accounted for to them as principal mortgage moneys. The object of the order for the separate report was to deal with the trustees as far as they were mortgagees, because it was a great point with Lewes to get possession of his estates, of which the mortgagees had been in possession since 1779, and they had nothing to do with the general account.

Attorney and
agent bound to
keep regular
accounts.

Vaughan v.
Lloyd, 5 Ves.
48.

Then what are the sums secured by the mortgages? Where one is attorney and agent he is bound to keep regular accounts, and if Morgan had done so, some credit might under the circumstances of this case have been given to the books. But he did not keep such accounts; and if he suffers any loss, it is owing to his own neglect in not keeping such accounts and vouchers as every prudent man ought to do; and it is impossible to put the man who does not deal regularly upon the same footing with him who does. In the case of *Vaughan v. Lloyd*, the Attorney dealt exactly in the same way, Vaughan being in Lloyd's hands, exactly as Sir W. Lewes was in the hands of Morgan. I was counsel for Lloyd, and I really believe he did suffer some loss; but that was owing to his own neglect in not keeping regular accounts; but I believe he suffered no great loss on an account which was cut down from about 30,000*l.* to 9,000*l.* There can be no safety in the common transactions between man and man, if the fact, that I have not kept regular accounts, is to enable me on my own assertion to charge another.

The settled accounts in this case confute them—April 1, 1816.
 selves. So we cannot presume that any sums were
 advanced, except such as appear to have been so by
 receipts and evidence, independent of the instru-
 ments. The decree of the Court of Exchequer

ACCOUNT.—
 ATTORNEY
 AND CLIENT.
 Settled ac-
 counts.

therefore proceeded on a right view of the subject,
 and the order of 1807 was also right; and this last
 order of the Court of Exchequer proceeds generally
 on a right view of the case, though the Court over-
 looked some circumstances. Then as to the ques-
 tion of regularity, the cause standing in their paper,
 and the order being made on the ground of the
 separate report, and of the exceptions to that re-
 port, it appears to me to be generally a proper
 order. The timber account might discharge the
 mortgage account. As to the judgments, they
 seem to have been included in the order for the
 separate report only because, in case it had been
 necessary to resort to that, the mortgagees might
 have an equity upon them to stand in John Mor-
 gan's place in his account against Lewes.

Objection on
 point of form
 not well
 founded.

Lord Eldon (C.) What do you think of Mor-
 gan's taking the timber in execution?

Lord Redesdale. I clearly think the produce of
 the timber must be applied in discharge of the mort-
 gage account, and never can be taken by Morgan
 for his own private account.

Produce of the
 timber to be
 applied in dis-
 charge of the
 mortgage ac-
 count.

Lord Eldon (C.) I repeat that this record ap-
 pears to me to open and establish this principle,
 that when an attorney takes it upon him to take
 securities from his client which do not express the
 real nature of the transaction it is incumbent on
 him, by other evidence than the securities them-

April 1, 1816. selves, to prove what was the real nature of the transaction, and what sums were really advanced.

ACCOUNT.—
ATTORNEY
AND CLIENT.

Decretal order of the Court of Exchequer of July 5, 1813, affirmed as to the allowing of the first exception in so far as it went to the certification that the 500*l.* was actually advanced as the consideration for the bond; reversed as to the allowance of the rest of the first exception, which was over-ruled without prejudice to any question that might arise on the general account; affirmed as to the allowance of the second and third exceptions; affirmed also as to the allowance of the fourth exception with a variation, so as to bring it within the principle that Lewes should pay to the mortgagees whatever should appear due on the mortgage account, without prejudice to any question that might arise on the general account; and so far as not reversed or varied, affirmed generally.

Agent for Appellants, —
Agent for Respondents, HUBERTY.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

COLCLOUGH—*Appellant.*
BOLGER and others—*Respondents.*

March 20, 32; A. TENANT for life under a marriage settlement, remainder
June 28, 1816. to his first and other sons in tail, with power to A. to lease

at the best rent for thirty-one years or three lives in pos-
 session, without taking fines, &c. makes leases at an under
 value, taking fines, &c. and grants annuities for lives of
 the grantees in violation of the power. Suit in 1772 by
 incumbrances, and the usual decree made; the son, re-
 mainder-man in tail, being then an infant eleven years of
 age. Master reports amount of the incumbrances, without
 stating yearly value of the estates, or the parts proper to be
 sold, though directed to do so by decree, and no exception
 taken by A. or any person for the infant. Sale before
 Master of part of the lands to B. at an undervalue, by col-
 lusion and management between B. and A. and A.'s agent,
 each of whom take some advantage from the transaction
 to the prejudice of the infant entitled to the inheritance;
 B. being cognizant of the leases and annuities in violation
 of the power and of the whole circumstances. A. dies in
 1794, when the son was prisoner in France. Bill by the
 son in 1800, to set aside the sale as fraudulent as against
 him, and the above circumstances in evidence. Bill dis-
 missed in 1808, in Ireland; but the decree reversed by the
 House of Lords, and the sale set aside as fraudulent
 as against the son.

March 20, 22;
 June 28, 1816.

FRAUD.—
 FRAUDULENT
 SALES OF ES-
 TATES NOT
 PROTECTED,
 THOUGH
 MADE UNDER
 COLOUR OF A
 DECREE IN
 EQUITY.

THE Appellant's father, Sir Vesey Colclough, on
 the death of his (Sir Vesey's) grandfather, Cæsar Col-
 clough, in 1766, became entitled to an estate tail
 in the estates of the Colclough family, in Ireland,
 comprising the manor, town, and lands of Tintern,
 and town and lands of the Mocurry or Duffrey
 estate, with their several sub-denominations and
 appurtenances in the county of Wexford; and
 also in the impropriate tithes of several parishes in
 the manor of Tintern, and other parishes in the
 counties of Wexford and Carlow, subject to certain
 portions for daughters of Cæsar, the grandfather,
 and other incumbrances, amounting altogether to
 14,000*l*.

1766. Sir Ve-
 sey Colclough
 entitled to es-
 tates tail.

March 20, 22;
June 28, 1810.

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.

1767. Mar-
riage of Sir V.
and settle-
ment. Sir V.
tenant for life;
remainder to
first and other
sons in tail.
Power to Sir
Vesey to de-
mise at best
rent, &c. and
without tak-
ing fines.

Sir Vesey intermarried, in 1767, with Catherine, the daughter of John Grogan, of John's Town, in the county of Wexford; and in consideration of the marriage, and 4,000*l.* portion with the wife, the abovementioned lands and tithes were, by deeds of lease and re-lease of June 12 and 13, 1767, strictly settled to the use of Sir Vesey for life, and to his first and other sons in tail male in the usual course of family settlements, Sir Vesey covenanting that the incumbrances did not exceed 14,000*l.*

The settlement contained a power to Sir Vesey to demise the lands and tithes, &c. comprised in it, for any term not exceeding three lives, or thirty one years in possession, and not in reversion, remainder, or expectancy, provided there should be reserved on every such lease the best and most improved rent that could be reasonably obtained for the same, without taking money or any thing by way of fine for, or in respect of, such leases.

July 7, 1767.
Settlement re-
gistered.

This settlement was registered July 7, 1767, pursuant to the statute 6 Anne, and in Trinity term in the same year a fine was levied, and a recovery suffered of the hereditaments mentioned, to the uses of the settlement pursuant to a covenant contained in it.

Two children
of marriage.
Appellant the
eldest son.

There were two children of this marriage, Cæsar Colclough, the Appellant, and John, his younger brother.

Sir Vesey be-
comes dis-
sipated and
embarrassed in
his circum-
stances.

Sir Vesey neglected to keep down the interest of the incumbrances, or any part of it; and it was in evidence, and stated by the Lord Chancellor (whose statement of the case is here followed), to be indisputably clear on that evidence, that Sir Vesey Col-

clough after his marriage became improvident and extravagant, and gave himself up to excessive dissipation, and thereby became extremely embarrassed and distressed in his circumstances.

March 20, 22;
June 28, 1816.

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE OF
EQUITY.

Amongst other denominations of land within the manor of Tintern, were the lands of Nash, Cloonagh, and Garryduffe, which were contiguous to the demesne and residence of the family, and were from their local situation and good quality very valuable.

It was alleged, and, as observed by the Lord Chancellor, established in evidence that Sir Vesey had, subsequent to the settlement, executed leases of the lands of Nash and Cloonagh, and of the impropriate tithes of several parishes at an undervalue, and had taken fines for some of the leases; and amongst others Sir Vesey executed two leases to one John Hill, a person who had been employed by Sir Vesey as his agent, one dated September 18, 1779, of the entire lands of Cloonagh for three lives, at 80*l.* *per annum*, which lands were at that time in possession of tenants under old leases at 104*l.* *per annum*, and in 1779 were worth 200*l.* a year; and the other in 1781, of 112 acres of the lands of Nash at 50*l.* a year, which was not half the value, and which lands had been let by Sir Vesey in 1776 at 72*l.* 13*s.* a year, of which lease Hill was assignee when he obtained the lease of 1781.

Leases and annuities granted by Sir Vesey in violation of the power.

Sir Vesey had besides granted several other leases at an undervalue, and being merely tenant for life had granted annuities or rent-charges, one of them

March 20, 22; for a trifling consideration, and the other for the life of the person to whom it was granted.

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.

Garrett Kavanagh, Sir Vesey's manager and agent.

1772. Bill by incumbrancers for payment.

1778. Decree and reference to Master to take an account; to report yearly value of the estates, and what parts most proper to be sold.

Appellant, Sir Vesey's eldest son, then an infant.

Master reports amount of incumbrances, but not yearly value nor parts proper to be sold.

1780. Decree for payment.

In or about the year 1779, and from that to 1789, Sir Vesey employed a person of the name of Garrett Kavanagh as receiver of his rents, and in some sense as manager and steward of his property; and this person was much concerned in the transactions which formed the subject of complaint in this cause.

On July 24, 1772, a bill was filed in the Court of Chancery, in Ireland, by Joseph Johnson, who had intermarried with one of the daughters of Sir Vesey's grandfather, and by other incumbrancers upon the lands comprised in the settlement of 1767, praying an account and payment by sale of a competent part of the estates or otherwise. By decree made in that cause in 1778, it was referred to the Master to take an account of the debts and incumbrances affecting the estates comprised in the settlement, and to report what was the yearly value of the estates, and what the most proper parts to sell. To this suit the Appellant, eldest son of Sir Vesey, was a necessary party, but being then an infant of only eleven years of age, the care of his interests fell into the hands of other persons.

The Master reported the amount of the debts and incumbrances, but not the yearly value of the estates, nor the parts most proper to be sold; and in June, 1780, a final decree was made by which the debts and incumbrances mentioned in the report, then amounting to 25,680*l.* a considerable part of which was made up of accumulation of interest,

were decreed charges on the estates; and it was decreed that the same should be paid in three months, or otherwise that a competent part of the estates should be sold to pay off the incumbrances.

March 20, 22;
June 28, 1816.

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.
Sale under de-
cree.

Under this decree certain purchases were made of the lands of Nash, Cloonagh, and Garryduffe, by a gentleman of the name of Henry Houghton, which purchases it was the object of the Appellant in this suit to set aside as fraudulent against him. Besides these, the tithes of certain parishes were purchased for Houghton, and the tithes of one parish in such a manner as that Houghton became entitled to a moiety, and a person of the name of Philip Roche to the other half.

Sir Vesey died in 1794, when the Appellant, his eldest son, was a prisoner in France. Upon discovering the manner in which his interest had been neglected in this transaction, and what he conceived to be the fraud in the proceedings, he in 1800 filed his bill in the Court of Chancery, in Ireland, to set aside the sales as fraudulent against him. In this suit Mary Bolger, widow, devisee and sole executrix of the above-mentioned Henry Houghton, deceased, and also widow of Richard Bolger, deceased, whom she married after Houghton's death, Margaret Rossitor, widow and representative of James Rossitor, who had some concern in the transaction, Philip Roche, and Thomas Richard Houghton, heir at law of the said Henry Houghton, were made parties defendants.

1794. Death
of Sir Vesey.

1800. Bill by
his son to set
aside the sale.

It was in evidence for the Appellant, by admission in Mary Bolger's answer, and by deposition of witnesses, that Sir Vesey had, soon after his marriage,

Evidence.

March 20, 22; and till the time of his death, been a dissipated man, and embarrassed in his circumstances. It was
 June 28, 1816.

FRAUD.—
 FRAUDULENT
 SALES OF ES-
 TATES NOT
 PROTECTED,
 THOUGH
 MADE UNDER
 COLOUR OF A
 DECREE IN
 EQUITY.

also in evidence that he made many improvident and unjustifiable dispositions and conveyances of the family property; and that the trustees under the settlement had not been sufficiently attentive to the interests of the Appellant; that Sir Vesey took fines on making leases, and made them at an under-value; that Garrett Kavanagh, Sir Vesey's agent and manager, had great influence over Sir Vesey, and was a dissipated, extravagant, and necessitous man, and not of very respectable character; and had, soon after 1767, obtained a lease from Sir Vesey at an under-value; that Kavanagh corresponded with Houghton on the subject of the purchases in question, and, soon after they were completed, obtained from Houghton a valuable lease of part of the property, which interest Kavanagh sold for 1100*l*. and that Kavanagh also soon after obtained loans of considerable sums of money from Houghton, which Houghton never attempted to recover during Kavanagh's life time; and also that Sir Vesey was to receive, and did receive, money for himself for permitting the sales at an under-value; and that Sir Vesey was at the time of the sales in a state of particular embarrassment and distress in his circumstances.

For the Respondents it appeared in evidence that Henry Houghton had, soon after his purchase, applied to the Court to set aside the sales, or some of them, on the ground of misrepresentation on the part of Sir Vesey and Kavanagh; and it appeared that the biddings were opened, Houghton engaging

to offer as much as before, and he again became the purchaser at the former price. It was in evidence also that Henry Houghton was a man of respectable character, and one not likely to be concerned in a fraud. There was some evidence also that the price was a fair one, especially as to the tithes, which, from the combinations in Ireland in 1784-5-6, against the payment of tithes, were then of low value.

March 20, 22;
June 28, 1816.

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.

The cause having come on for hearing before Lord Chancellor Manners in Hil. Term, 1808, the bill was dismissed without costs; and from that decree of dismissal the Plaintiff appealed.

1808. Cause
heard, and bill
dismissed.

Appeal.

It was contended for the Appellant that Henry Houghton could not but know that the leases had been made at an under-value by Sir Vesey, and were therefore a fraud on the son; and that a purchaser was as much bound to examine his title in a sale before the Master, as in the case of a sale elsewhere, and that a sale before the Master gave no particular authenticity to the title; and that it was clearly a case of fraud and collusion, where all the parties derived some benefit from the transaction at the expense of the remainder-man.

March 20, 22,
1816. Hear-
ing in the
House of
Lords.

On the other side, it was urged that the proceedings in the Court below had been perfectly regular, and that it would be dangerous to disturb purchases made under decrees of Courts of Equity; that the price was not inadequate, and that Cornelius Grogan, the maternal uncle of the Appellant, and a party to the settlement, having been made a party to the suit of 1772, the interests of the infant remainder-man had not been neglected.

March 20, 22;
June 28, 1816.

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.

Irish practice
as to infants
showing cause
when of age
against decrees
affecting their
interests.

Lord Eldon (C.) Is it the practice in Ireland in these cases to give the infant when he comes of age an opportunity of showing cause against the decree?

Lord Redesdale. I believe that is a point to which they have paid little attention. There have been decrees where that was not done, and I remember, I observed on that circumstance, and gave the opportunity. In this cause Sir Vesey was tenant for life, and the Appellant was the remainder-man in tail; and in such a case in this country, the remainder-man in tail having been an infant at the time of the decree, he would, when he came of age, have been called upon to convey, and might show for cause against the decree that his interest had not been sufficiently attended to, and he might, if he thought proper, file a fresh answer to the bill.

Sir S. Romilly and *Mr. Leach* for Appellant;
Mr. Hart and *Mr. Wetherell* for Respondents.

Judgment,
June 28, 1816.

Lord Eldon (C) (after stating the case as above). The question below in this cause was whether the purchases were effected under such circumstances of undue management, as to induce the Court at the instance of this Appellant, whose inheritance was injured, to consider the sale as against him, as—in that sense in which a Court of Equity attaches to the word—fraudulent. The Lord Chancellor of Ireland thought that they were not, and the bill was dismissed, I believe, without costs. And the question now is whether that decree of dismissal was right.

Decree in
equity no pro-

A great deal has been said, and justly said, re-

specting the danger and hazard of setting aside purchases made under decrees of Courts of Equity; and nobody can be more ready than I am to accede to that doctrine, or could be more ready to act upon that principle, provided the circumstances were such as would enable us to consider the transactions in question as really and fairly proceeding upon the decree of the Court, and not upon the mere management of the parties themselves. But after looking at this case minutely, and examining all its circumstances, the conduct of Houghton, of Kavanagh, and Sir Vesey Colclough, I find it impossible not to conclude that the interests of this Appellant, which some of them were bound to take care of, were in the course of these proceedings sacrificed.

In the first place, the Master's report did not give the information which the Court required, viz. what was the yearly value of the estates, and what were the most proper parts to be sold. But this is not all; for before that suit of 1772 was commenced, Sir Vesey had granted annuities which he had no right to grant, and which would affect the price of the estates sold subject to them; and he gave leases which he had no power to make, and which being made at an undervalue must have brought the property to market under such circumstances, that it was impossible the infant entitled to the inheritance could have had his fair share of the consideration. But even that is not all; for I think it clear from the evidence that Sir Vesey was paid for his concurrence, that Garrett Kavanagh was paid for his management, by the benefit which he derived from the transaction, and that Henry Houghton was perfectly

FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.

tection to a
purchase ef-
fected by ma-
nagement of
vendor, ten-
nant for life,
and the pur-
chaser him-
self, to the
prejudice of
the remainder-
man entitled
to the inher-
itance, under
colour of a de-
cree in equity,
the remainder-
man, though
a party to the
suit, being an
infant at the
time.

Interests of
the infant sa-
crificed; and
how.

June 13, 1816.

June 28, 1816. cognizant of the leases, annuities, and all the circumstances which affected the sales.

**FRAUD.—
FRAUDULENT
SALES OF ES-
TATES NOT
PROTECTED,
THOUGH
MADE UNDER
COLOUR OF A
DECREE IN
EQUITY.**

Sales fraudulent and invalid as against the Appellant, though made under colour of a decree in equity.

It is under these circumstances, and for these reasons, of which I have given a general statement, that I think this a case in which I may safely say that, *as against this Appellant*, the sales ought not to be held valid, though they have the colour of the protection of a decree of a Court of Equity. Though they might be valid as between Sir Vesey and the other parties, yet they cannot be so held as against the infant entitled to the inheritance. I should propose, therefore, to your Lordships to reverse this decree, and to direct the proper accounts to be taken of the rents and profits of the hereditaments which formed the subject of sale, and of the principal and interest of the purchase money, and to declare that the sales were fraudulent as against the Appellant, and ought to be set aside, the lands, &c. standing as a security for the money actually advanced; I believe I may state that my noble friend (Lord Redesdale, present) concurs with me in this view of the case.

Decree reversed, with directions as above.

Agents for Appellant, SETON, and PLOMER.

Agents for Respondents, FOULKES, LANGFORD, and WALFORD.

ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

DOE, *d. Oxenden*—*Plaintiff in Error.*SIR ARTHUR CHICHESTER—*Defendant in Error.*

WHERE lands *at or of* any particular place are devised, Feb. 22, 25;
 parol or extrinsic evidence is not admissible, to show that June 12, 1816.
 the devisor included under the description, and intended
 to pass, other lands not at that particular place.

And therefore where one having lands in the manor of Ashton, in Ashton parish, and also other lands in several of the neighbouring parishes, made his will, and devised lands under the description and name of "my estate of Ashton,"—and parol or extrinsic evidence was offered to show that the testator in his life-time was accustomed to designate the whole of the lands derived from his mother, including not only the estate at Ashton but also the lands in the neighbouring parishes, by the general name of his "Ashton estate,"—the House of Lords, concurring in the unanimous opinion of the Judges, held that the evidence had been properly rejected.

EXTRINSIC
OR PAROL
EVIDENCE
NOT ADMIS-
SIBLE TO EN-
LARGE THE
EFFECT OF
THE TERMS OF
A WILL.

THIS was an action of ejectment brought in the Ejectment
 Court of King's Bench to recover possession of cer-
 tain lands and hereditaments in the parishes of Cre-
 diton, Sandford, Netherex, and Cadbury, in the
 county of Devon, which the lessor of the Plaintiff
 claimed under the will of the late Sir John Chi-
 chester, as constituting part of the premises devised
 to him, under the description and by the name of

Feb. 22, 25 ; the devisor's "*estate of Ashton*," in the county of
June 12, 1816.

EXTRINSIC
OR PAROL
EVIDENCE
NOT ADMIS-
SIBLE TO EN-
LARGE THE
EFFECT OF
THE TERMS OF
A WILL.

Whether under the words in a will, "my estate of Ashton," extrinsic evidence is admissible to show the intent to pass other lands not in Ashton. The extrinsic evidence rejected below.

Bill of Excep-
tions.
Evidence.

Will, devising the Ashton estate to the lessor of the Plaintiff.

Devon ; and the question turned upon this, whether parol or extrinsic evidence was admissible to show that the devisor, under the description " my estate " of Ashton," intended to include other lands, &c. not in Ashton.

The cause was tried at the Assizes for the county of Devon in August, 1811, before Baron Graham, who rejected the extrinsic evidence, and a verdict was given for the Defendant. Whereupon a bill of exceptions was tendered, and duly sealed and signed. The evidence, as appearing on the bill of exceptions, was as follows :

It was proved for the Plaintiff, that " Sir John Chichester, Baronet (since deceased), was seized in his demesne as of fee, as well of the tenements in the declaration mentioned, and of the manor of Ashton, and certain other tenements and hereditaments, situate in the parish of Ashton, in the said county of Devon, all which he derived from his mother, as of divers other lands and tenements which he derived from his father, called the Youlston estate, that the said Sir John Chichester being so seized on the third day of September, in the year 1808, made and published his last will and testament, in writing, duly executed so as to pass real estates, in the terms following : ' *I give my estate of Ashton, in the county of Devon-shire, to George Chichester Oxenden, second son of Sir Henry Oxenden, Baronet, of Broome, in the county of Kent ; I give my house in Seymour Place (for which I have given a memo-*

“ ‘ *randum of agreement to purchase, and which is* Feb. 22, 25 ;
 “ ‘ *to be paid for out of timber which I have or-* June 12, 1816.
 “ ‘ *dered to be cut down)* to the Reverend John
 “ ‘ *Sanford, of Sherwell, in Devonshire ;*’ and that
 “ the said Sir John Chichester afterwards, and be-
 “ fore the said time when, &c. died so seized, with-
 “ out altering or revoking his said will. And it was
 “ further proved that the said tenements, in the said
 “ declaration mentioned, consist’ of the manor of
 “ Stowford, in the county of Devon, and of the
 “ tithes impropriate of the parish of Netherex, in
 “ the county of Devon, and two estates called Great
 “ and Little Bowley, in the parish of Cadbury, in
 “ the said county of Devon ; that of the manor of
 “ Stowford one part lies in the parish of Crediton,
 “ in the said county of Devon, and the other part
 “ in the parish of Sandford, in the same county, the
 “ manor itself being distant from the parish of Ash-
 “ ton about twelve or thirteen miles ; that the pa-
 “ rish of Netherex is also eleven or twelve miles,
 “ and the parish of Cadbury fifteen miles, distant
 “ from the parish of Ashton. And it was also
 “ proved that the estate which the said Sir John
 “ Chichester so derived from his mother, and of
 “ which he was so seized at the time of making his
 “ said will, consisted as well of the tenements above
 “ particularly described, as of the manor of Ashton,
 “ the barton of Ashton, and other lands, lying with-
 “ in the parish of Ashton, and also of the manor of
 “ George Teign, which is situate in the said parish
 “ of Ashton. And it was further proved, (lease
 “ entry and ouster).—And in order to show that by

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A WILL.

Evidence
which was of-
fered to show
that the testa-
tor included
under the de-
scription of
"Ashton es-
tate" lands
not in Ashton.

" the words '*my estate of Ashton*,' used in the said
" will of the said Sir John Chichester, the said Sir
" John Chichester intended to dispose of the whole
" of the estate which he derived from his mother,
" hereinbefore described, the counsel for the plain-
" tiff proposed and offered to prove and give in evi-
" dence, by John Sanford, who wrote the said will
" of the said Sir John Chichester, that at the time
" of making the same, the said Sir John directed
" him to make a memorandum, to guard against
" accidents, to give George Oxenden (meaning the
" said George Chichester Oxenden) his, the said Sir
" John's Ashton estate; and also to prove and give
" in evidence, by the said John Sanford and Thomas
" Hole, Clerk, who had occasionally audited the
" accounts of the said Sir John, for twenty-four or
" twenty-five years previous to his decease, that the
" said Sir John, in his life-time, used, in speaking
" of his property which he had derived from his
" father, to call it his *Youlston estate*; and that in
" describing the estate derived by him from his
" mother, he used to designate that by the general
" name of his *Ashton estate*, or Ashton property;
" and particularly, on one occasion, directed that
" the timber should not be cut down on his mother's
" property, the Ashton estate, but on his father's
" property. And the counsel for the Plaintiff, for
" the purpose last aforesaid, produced, and offered to
" give in evidence, a series of annual accounts, deli-
" vered to the said Sir John Chichester by John
" Cleave and John Smith, who were successively
" two of his stewards. These accounts commenced

“ with the year 1785, and the form of each of them
 “ was very nearly the same. The following is a de-
 “ scription of the form of one of the said accounts.
 “ On the outside was endorsed, ‘ *J. Cleave’s account*
 “ ‘ *for Ashton estate, from January the 1st, 1799,*
 “ ‘ *to January the 1st, 1800.*’ The first page there-
 “ of was thus headed, ‘ *J. Cleave’s account for Sir*
 “ ‘ *John Chichester, Baronet, for Ashton estate,*
 “ ‘ *from January the 1st, 1799, to January the 1st,*
 “ ‘ *1800.*’ In the first page was contained a list of
 “ various payments made by the said John Cleave,
 “ among which was the following: ‘ *Paid a year’s*
 “ ‘ *annuity to Broad Clist poor, to Christmas 1799,*
 “ ‘ *23l. 11s.*’ which said parish of Broad Clist was
 “ wholly distinct from the estates derived by the
 “ said Sir John from his mother, but the annuity
 “ was charged on part of the said estate. The se-
 “ cond and third pages were entitled, ‘ *Receipt of*
 “ ‘ *rack rents,*’ and contained an account of the
 “ rents of the several premises composing the estate,
 “ derived by the said Sir John Chichester from his
 “ mother, except the conventional rents of the
 “ three manors in separate sums, but added up at
 “ the end in one general total. The fourth page
 “ contained a list of rents, entitled ‘ *Conventional*
 “ ‘ *rents of the manor of Ashton.*’ The fifth page
 “ contained a list of two other sets of conventional
 “ rents, the one entitled ‘ *Conventional rents of*
 “ ‘ *the manor of George Teign,*’ and the other en-
 “ titled ‘ *Conventional rents of the manor of Stow-*
 “ ‘ *ford.*’ The last page of the said account was en-
 “ titled ‘ *Account stated,*’ and is as follows :

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**Feb. 22, 25 ;
June 12, 1816.**

ACCOUNT STATED.

<p> <i>June 12, 1860.</i> <i>EXTRINSIC</i> <i>OR PAROL</i> <i>EVIDENCE</i> <i>NOT ADMIS-</i> <i>SIBLE TO EX-</i> <i>LARGE THE</i> <i>EFFECT OF</i> <i>THE TERMS</i> <i>OF A WILL.</i> </p>	<p> <i>" J. Cleave, Dr. £ s. d.</i> <i>" To receipt of rack</i> <i> " rents..... 1042 12 2½</i> <i>" To receipt of con-</i> <i> " ventionary rents</i> <i> " of Ashton Manor 18 15 2</i> <i>" To receipt of George</i> <i> " Teign Manor..... 5 6 0</i> <i>" To receipt of Stow-</i> <i> " ford Manor... 9 11 6</i> <i>" To balance of last</i> <i> " account..... 102 2 0</i> <hr/> <i>£1178 7 4½</i> </p>	<p> <i>" J. Cleave, Cr. £ s. d.</i> <i>" By payment..... 708 7 0</i> <i>" By balance due from</i> <i> " J. Cleave..... 470 0 4½</i> <hr/> <i>£1178 7 4½</i> </p>
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“And underneath is the following receipt, the signature to which is in the hand-writing of said Sir John Chichester.

“ April 1, 1800, examined this account and re-
 “ ceived the vouchers thereof; and due from the
 “ said John Cleave, on the balance thereof, the sum
 “ of 470l. 0s. 4½d.

"JOHN CHICHESTER."

**Judgment in
K. B. for Deft.
Error brought.**

Judgment having been given for the Defendant, the Plaintiff brought his Writ of Error returnable in the 'House of Lords, and assigned for error, in addition to the common errors, the rejection of the evidence set out in the bill of exceptions, to show the intent of the testator to pass the whole of his maternal property under the description of his Ashton estate ; and the defendant rejoined *in nullo est erratum*.

**Hearing in the
House of
Lords, Feb.
1816.**

The cause came on for hearing in the House of Lords, on February 22, 1816, (the Judges attending.)

Heywood, Sergt. (for Plt. in Error.) If it had

not been for a case decided in C. B., there would be little difficulty here. The rule in Bacon's *Maxims*, *Ambiguitas verborum latens persificatione suppletur*, &c., "a latent ambiguity may be explained by evidence," never appeared to have been trencched upon till that case in C. B. The only restriction is that no parol evidence can be admitted to contradict what appears on the face of the instrument. If it does not contradict it, it may be received. The evidence here is merely to show what is comprised in the words. There is no apparent ambiguity in the words Ashton Estate, and it may include lands connected with it, though not lying in Ashton parish. The words are my estate of Ashton in the county of Devon, &c.' Estate may mean the interest in the land, or the land itself, or both; so that the word, when used, must be subject to explanation. There is no particular locality annexed to the word or in Johnson's Dictionary; it is stated as meaning *concerning, belonging to, &c.*; nor does the word Ashton imply any particular locality: suppose it had been purchased from a person of the name of Ashton. The words themselves here are clear: the only question is on what they attach. An estate may be devised by a nickname, *Tuttesham v. Roberts*, Cro. Jac. 21.—*Wyndham v. Wyndham*, Ander. 58. Godbolt, 16. But there is another case, which carries the doctrine for which we contend much further than the present case; that of *Dormer v. Dormer*, Finch, 432. where a testator seized of real estates in Hampshire and Sussex, formerly called the Banisters, *Idsworth* in Hampshire being the ancient seat of the

Feb. 22, 25;
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B. Max.
Rule 23.

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family, usually comprehended the estates in both counties under that name, and devised his estate *at Idsworth* for payment of debts and portions. The Court held that the whole estates in Hampshire and Sussex were liable for payment of the debts and portions. This was so much stronger than the present case that I might rest here; but then in C. B. there has been a decision contrary to what we contend for, and which seems to be the first of the kind. In *Doe, d. Oxenden v. Chichester*, 3 Taunt. 147., the Chief Justice of C. B. laid down a new rule of law. In giving his opinion he said: "On the whole I think we should go further in receiving this evidence than any case has yet done." If *Dormer v. Dormer* had been there cited, he would have thought differently. (*Lord Eldon* (C.) Has any one looked at the Register Book to see how far this report corresponds with it?) No. The rule he says is, "that evidence cannot be received if the will has an effective operation without it." I say there is no such rule, and I could cite thirty cases against it. There is hardly a volume of Vesey without a dozen of them. The Chief Justice said:—"I need not particularize the cases of devises, where there were two persons of the same name, and where the name by which the property was devised applied equally to two estates. Such was the case in *P. Williams*, of a devise to *Gertrude Yardley*, by the name of *Catherine Earnley*. And the case in *Ambler*, of legacies to *John* and *Benedict*, sons of *John Sweet*, who had two sons, the name of the one *Benedict*, but the name of the other

Beaumont v.
Fell. 2 P.
Wms. 140.
Dowsett v.
Sweet, Amb.
175.

“ *James*. The evidence was received. It is not Feb. 22, 25;
 “ expressly said in any of these cases, that it was June 12, 1816.
 “ necessary to receive the evidence in order to give EXTRINSIC
 “ effect to the will, which could not operate with- OR PAROL
 “ out such evidence. But although this is not said, EVIDENCE
 “ yet the rule seems to hold.” I do not dispute NOT ADMIS-
 that there are two classes of cases, and that in one SIBLE TO EN-
 of them parol evidence is not admissible, where LARGE THE
 the will has an effective operation without it. But EFFECT OF
 then, where the words are capable of two meanings, THE TERMS
 both of them giving effect to the will, the question OF A WILL.
 is which meaning is to take place: and what I
 complain of is the application of the rule to these
 cases. The present case is quite clear of locality.
 Though there were lands in four different parishes,
 if he used to call them the Ashton estate, the whole
 would pass. They may perhaps say that *of* is
 equivalent to *at*: suppose so for the sake of argu-
 ment; yet after the case of *Dormer in Finch*, even
 the word *at* does not exclude evidence to show that
 lands in different counties were comprised. And
 see whether *at* is always a word of locality; for if
 it has two meanings, that must be given to it which
 best corresponds with the intent. Now suppose
 the testator had looked at Johnson’s Dictionary, he
 would have found that *at* meant *near*, and using it
 in that sense the whole would be included. But,
 however that point is decided by the case in *Finch*.
 The next case is that of *Whitbread v. May*, 2 Bos.
 Pull. 593., where one devised his estate *at* Lushill,
 in Wilts, and *Hearne*, in Kent. The testator had
 lands in other parishes in Kent, as well as in the
 parish of *Hearne*, all which he had purchased by

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EFFECT OF
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OF A WILL.

Sawyer in-
stead of Swop-
per, Masters
v. Masters.
1 P. Wms.
420, 425.

one contract from one person, and was accustomed to call his "Hearne estate," or "Hearne Bay estate;" and the question was whether these facts should be admitted in evidence, to show that he intended to pass the lands in the other parishes, as well as those in Hearne. There was a great deal of doubt about it, and the Court was equally divided, though judgment was *pro forma* given for the Plaintiff. The matter went no further, and seems to have been compromised. But the Court was at any rate equally divided, and if the case of Dormer had been cited, the judgment would have been for us. There is a class of cases where such evidence has been admitted, because necessary to give effect to the will, as in a case in which *Sawyer* was written for *Swopper*, where it was referred to the Master to inquire who was meant. So in *Day v. Trigg*, 1 P. Wms. 286., where a testator devised his freehold houses in a particular place, and had no freehold but some leasehold houses there; and upon evidence that he meant the leasehold houses, they were held to pass. But if the testator had had freehold houses there, no evidence of intention to pass the leasehold would have been admitted. In *Doe, d. Cook et Ur. v. Danvers*, 7 East. 299. Lord Ellenborough said, that it must be taken that the testator meant her customary land, having no other description of land in the manor. And so in *Lane v. Earl Stanhope*, 6 T. R. 345. 352.—And *Turner v. Husler*, 1 Bro. Ch. Ca. 78. But what we combat is the generality of the rule, and we are ready to point out a series of cases where evidence was admitted, when the question was whether the

will should operate in one way or in another, as in *Doe, d. Freeland v. Burt*, 1 T. R. 701. and *Doe, d. Clement v. Collings*, 2 T. R. 498. and (anonymous), 1 P. Wms. 267. There is a long series of Chancery cases of election, where such evidence has been admitted; as in *Pulteney v. Lord Darlington*, 1 Bro. Ch. Ca. 224. cited in *Druce v. Denison*, 6 Ves. 385. So in a case of devise of real estate, where the will might have effect without the evidence, it was still admitted, to show that a certain estate tail was included, *Finch v. Finch*, 4 Bro. Ch. Ca. 48. And see also *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. (*Lord Eldon* (C.) A case came before *Gr. Andrews v. Lemon*. Lord Kenyon, when M.R. where one having, besides personal property strictly his own, other personal property which he had a power to dispose of by deed or will, bequeathed all his personal estate, &c. Evidence was at first admitted that by *all* he meant both his own, and that which was the subject of the power. But it was afterwards rejected.) That was in the execution of a power, which is a different thing. (*Lord Eldon* (C.) It would effect you in this way, when you speak of a latent ambiguity *that* is raised by the evidence which removes the doubt. Now there the evidence was that he considered his own property only as his personal estate; and *Lord Kenyon* said that this was not ambiguous, and in common parlance it perhaps was not, but the words might be understood in another sense, and were clearer than "my estate of Ashton.") But there the property was not held in his own right, but in right of his wife, and at any rate the subsequent cases overturned the authority of that case.

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Feb. 22, 25; In *Druce v. Denison*, 6 Ves. 385. Lord Eldon
 June 12, 1816. says p. 402: "Parole evidence is admissible upon a

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"latent not a patent ambiguity, to rebut equities
 "grounded on presumption, and perhaps to sup-
 "port the presumption to oust an implication, and
 "to explain what is parcel of the premises granted
 "or conveyed." After that case and that of *Pul-
 teney v. Lord Darlington*, we conceived that the
 matter had been settled, and that these must out-
 weigh the authority of that one decision. It was
 stated before that, in all cases of election, evidence
 was admitted to show what subjects the words were
 to operate upon, though they might operate without
 such evidence. (*Lord Eldon* (C.) I thought our
 rules as to election had been settled. It must appear
 on the face of the will that the testator proposes
 that there should be an election, and as to what
 subjects.) In cases of election, a latent ambiguity
 in the will may be explained, even when the will
 might take effect without, as in *Finch v. Finch*,
 4 Bro. Ch. Ca. 48; and *Rutter v. Maclean*, 4 Ves.
 531. Almost half of the volumes of Vesey were
 cases of wills, where no such rule ever appeared, as
 that no evidence could be admitted unless the will
 was inoperative without it. No such rule was ever
 heard of till the case of *Doc, d. Chichester v. Ox-
 enden*, in C. B.

Finch v.
Finch, 1 Ves.
 534.

The same rules applied as well to persons as to
 things, *Dowset or Dorset v. Sweet*, Amb. 175.—
Harris v. Bishop of Lincoln, 2 P. Wms. 125. In
 the former case, legacies were given to John and
 Benedict, sons of John Sweet. There was no John
 but James, and evidence was admitted to show that

James was meant. This is in point; though it is true if there were two Johns the bequest would have been void for the uncertainty, unless the evidence were admitted. So where there is a devise to R. B. and the father and son are so named, the elder shall take; but evidence may be given to show that the son was meant: *Lepiot v. Brown*, 8 Vin. 197. So in *Hampshire v. Pearce*, 2 Ves. 216. where there was a bequest to Sir John Strange's four children, &c.; the four might take, and yet evidence was admitted to show that all the children were meant. Then the rule is that, where there is a latent ambiguity, evidence will be admitted to explain it, and the question is not whether the will can have any operation without the evidence.

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*Lepiot v.
Brown*, 1 Salk.
76 Mod. 199.

Gaselee (for Plt. in Error). In every case of latent ambiguity, you must have the evidence before the ambiguity appears. Where a testator bequeathed "the house I live in," *Doe, d. Clements v. Collings*, 2 T. R. 498. evidence was admitted to show what he occupied along with it; and the stables, coal-pen, &c. were held to pass, though he used these premises for the purposes of his trade, as well as the convenience of his house, and they stood over the way; and an indictment for burglary could not be sustained upon the ground of their forming part of the dwelling house; and see also the case of *Pole v. Lord Somers*, 6 Ves. 309. Now what is the evidence here? The declaration of the testator to the person who made his will, as to what he wished to have done. There is no question of locality, and it seems clear that the evidence may

Feb. 22, 26; be let in to show what is or is not Ashton. Decla-
 June 12, 1816; rations at the time of making the will may be given

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in evidence, though declarations made before cannot be admitted, and so it is allowed by Lord Kenyon and Lawrence, J. in *Thomas d. Evans v. Thomas*, 6 T. R. 671, 677, 678. There are many Equity cases in answer to the one mentioned by one of your Lordships, and among others, *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. and *Pole v. Somers*, 6 Ves. 309., in both which the evidence was admitted. To these may be added the case of *Druce v. Denison*, 6 Ves. 385., in which two points were established: 1st, That papers in testator's own handwriting relative to the estates devised may be given in evidence: 2d, That his declarations and actions may be admitted in evidence, to show that in bequeathing all his personal property he meant to dispose of what was not strictly his own. What may be the effect of the evidence is another question, as there are cases to show that a power cannot be bequeathed without distinct reference to it in the will. The only case to impugn that of *Dormer v. Dormer* is *Doe, d. Chichester v. Oxendon*, in C. B. We shall hear of others, but they are all built on that, such as *Doe v. Greening*, 3 Maul. Sel. 171., and a subsequent case decided on the same ground: But Dormer's case was not cited to the Court. It was there said that no evidence of this description had ever been admitted, where the word was *at*. But the case of Dormer shows the contrary, and at any rate the word here is not *at* but *of*. Suppose the testator had devised his Youlston estate to A. and his Ashton estate to B. which

Finch 432.

in his view constituted the whole property, would evidence not be admitted to prevent an intestacy as to what was strictly in neither Youlston nor Ashton? The term *of* may mean any thing, and parol evidence must be admitted to show its particular application. It is conceded that lands in the manor of Ashton would be comprised, but how can the line be drawn between manor and parish without parol evidence? It is too narrow a rule to say that no evidence shall be admitted unless the will be inoperative without it. Suppose a devise to John Thomas, and testator has two sons of that name, one natural, the other legitimate. The legitimate son might take, yet evidence would be let in to show that testator meant the other.

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Mr. Sergeant Pell (for Deft. in error). The question ultimately will be whether under the word *Ashton* estate, the manor of Stowford, &c. in other parishes passed. I do not impugn the rule stated from Lord Bacon's maxims; but before that can be brought in aid, your Lordships must be satisfied that there is a latent ambiguity, and when parol evidence is offered to show a doubt, there must be further parol evidence to clear up the doubt which has been raised. They offer to show that, besides the property in Ashton parish, the testator had other property which he sometimes included under the denomination of his Ashton estate, and they said that it necessarily followed that such other property passed under this devise. That however is by no means a necessary consequence, and therefore the collateral evidence, if admitted, would not clear

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Wyndham,
And. 58. God-
bolt. 16.

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up the doubt. A great part of the cases cited relative to questions of presumption, fraud, satisfaction, and election, do not appear to touch the point. But one or two of them make for us. In the case from Godbolt, it is remarkable that Anderson, in giving judgment, states as the reason why the words were extended in that case, that otherwise the will would not be operative as to that portion. The case of Dormer was that of an entire estate called the *Banisters*. The testator changed that name, and called it *Idsworth*. The present however is not a case of an entire estate. There are cases in which Courts have looked at the state of the testator's property to see what passed by the will, such as *Pole v. Somers*.—*Druce v. Denison*, and others, and I do not controvert them. But the moment the nature of the property is ascertained, there is an end of surmise; and to admit evidence that something else was meant, would be to do away the effect of the statute under which property of this description passes. A great deal may be found for us in Cheney's case, 5 Rep. 68.—Suppose the heir at law wished to dispose of the manor of Stowford, would he have any more to do than to show this will to prove that it did not pass under it? Even the word *all* is not to be found here. In *Doe v. Greening*, the word was *at*—here it is *of*. But that case is of importance for us, in as much as Justice Dampier there expressed his concurrence in the judgment of the Court of C. B. in *Doe v. Oxenden*. Justice Lawrence at first received the evidence, but there was a motion for a new trial, on the ground that it ought not to have been received, or that if to be received

Pole, v.
Somers, 6 Ves.
309.—*Druce*
v. Denison, 6.
Ves. 385.

Doe v. Green-
ing, 3 Maul.
sel. 171.

Doe v. Ox-
enden, 3
Taunt. 147.

it did not prove the point. Lawrence, (J.) then <sup>Feb. 22, 25;
June 12, 1816.</sup> changed his opinion; and the Chief Justice (Mansfield), eminently distinguished for his knowledge of <sup>EXTRINSIC
OR PAROL
EVIDENCE</sup> law and equity, delivered the unanimous opinion of the Court that the evidence ought not to be admitted, <sup>NOT ADMIS-
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THE TERMS OF</sup> and the greatest inconvenience would follow if the principle of that decision were overturned.

Casberd (for Def. in Error). The property is ^{A WILL.} described as consisting of different estates in four different parishes. The paternal property had an appropriate designation of its own; the maternal had no particular designation of its own; and the question is, whether evidence shall be admitted to show that the whole passed by a new designation affixed to it by the testator himself. This does not purport to be a devise of the whole maternal property, and it is submitted that it is not competent by evidence so to enlarge it. If it had been "my estate *at*," instead of "my estate *of*" Ashton, by the modern decisions it is clear the whole would not pass. But we are pressed by the case in *Finch*. Taking it for <sup>Dormer v.
Dormer,
Finch. 432.</sup> granted that it is accurately reported, I submit it is not now law. If it is, then *Doe v. Greening* is not law. It was held there that, as the words had a precise meaning and were sufficient to satisfy the will, it should only operate on the particular subject of the devise; so that the case of *Dormer* is not law. But then it is said that this is distinguishable from *Doe v. Greening*, as the word here is not *at*, <sup>*Doe v. Greening*, 3 Maul.
Sel. 171.</sup> but *of*; and that therefore this is not a local description. But it is admitted, on the authority of Johnson's Dictionary, that *of* means *concerning, belonging to*. Then suppose the words here had been

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a local description as if it were *at* Ashton. There is then a property designated in the will itself by which the terms of the will are satisfied. There is no ambiguity on the face of the will, because then the ambiguity would be patent and not latent, and where the ambiguity in the will is patent, no evidence can be admitted: *Cheney's case*, 5 Rep. 68.

The case might be rested here. If there is a patent ambiguity the evidence cannot be received, and if there is no patent ambiguity there is a property to satisfy the terms of the will. The evidence is offered to raise the ambiguity, and then to get rid of it; but I am in doubt whether it is to explain a latent ambiguity, or to enlarge what is expressed. I submit, however, that where there is property to answer the terms of the will it is not competent by evidence to enlarge it. Against this they cite *Doe, d. Clements, v. Collings*, 2. T. R. 498.—But that case when examined does not bear them out. The Court there said that there was a distinction between house and messuage, so that it appears to have been a question of construction on the face of the will. I submit then, on two grounds, that this evidence ought not to be received: 1st, unless it be absolutely necessary to receive it in order to make the will operative at all; 2d, because, if received, the intention of the testator would be collected, not from the will, but from evidence *dehors*. As to the first ground, the principle was recognised in *Pyot v. Pyot*, 1 Ves. 355. and in *Ulrich v. Litchfield*, 2 Atk. 373, and in *Beaumont v. Fell*, 2 P. Wms. 140, where there was a bequest to "Catherine

“Earnly,” and it being clear that there was no such person as *Catherine Earnly*, evidence was received that the testator meant *Gertrude Yardley*, and the reason was stated at the end of the report, that the will would be so far inoperative without it. So in *Day v. Trigg*, 1 P. Wms. 286, where one devised his freehold houses, &c., having some leasehold but not freehold houses, the word freehold was rejected rather than the will should be void. That is the principle on which the cases proceed: and *Rose v. Bartlett*, Cro. Car. 292.—*Dowsett v. Sweet*, Amb. 175.—and *Wyndham v. Wyndham*, Ander. 58. were all decided on this principle. The conclusion then is that, if there are any lands capable of passing by the terms of the Will itself, it is not competent by parol evidence to enlarge the words; as there is no necessity in the case, which is the only ground for the admission of parol evidence. As to the other ground, in *Cheney’s case*, 5 Rep. 68. the object was to introduce extraneous matter, but the Court expressed itself decidedly against it. There is another case which has not been as yet referred to, *Doe, d. Brown, v. Brown*, 11 East. 441. where it was contended that extrinsic evidence ought to be admitted to prove the intent of a testator to include freehold property under a description of all his copyhold estates. Lord Ellenborough said (p. 450), “It would be going further than any case which we are aware of has yet gone, in admitting evidence of intent from extraneous circumstances to extend plain and unequivocal words in a will.” *Brown v. Selwyn*, Ca. Temp. Talb. 240. was decided on the same principle.

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These cases establish the principle that, where the words are clear, and there is property to answer the description, it is not competent to enlarge them by parol evidence. The cases cited on the other side on questions of election, presumption, and satisfaction, are all inapplicable. The inconvenience that would result from a contrary rule has been already mentioned. The maternal property had no joint or definite name by which the whole was known, and under these circumstances the will was made. Suppose then that all the maternal property, except the estate at Ashton, went to the heir at law as undisposed of, and there had been no question about it, and suppose the heir at law were desirous to sell it, no conveyancer would venture a doubt that more than the property at Ashton passed by the devise. The present case differs from the cases of latent ambiguity, such as two sons named John, or two estates of the same name. But here I do not see how the phantom is to be raised before it is destroyed. There are no two estates at Ashton here. Besides, this is a question between an heir at law and devisee; and it is a rule of law that an heir at law shall not be disinherited except by express words or necessary implication.

Feb. 22, 1816. *Heywood, Sergt.* (in reply). If subjects were known under one general name, they would all pass under that name though in different parts of the kingdom, and however distant from each other. I do not know that I cited any cases as to fraud, presumption, and satisfaction; but I did cite several cases of election to prove that there was no such

restriction as that now contended for, as to the admissibility of parol evidence where there is a latent ambiguity, even in a Court of Equity. The case from Godbolt shows that estates may pass under any general name; and as to the remark on the case of Dormer, that it was a case of an entire estate, this too is the case of an entire estate. But Mr. C. says that the case of Dormer, which appears to be the same in the Register's book as in the report, is not law, having been over-ruled in *Doe v. Greening*. That was not a case of latent ambiguity but of construction, and has nothing to do with the present case. The word Ashton has not a specific description of any property. There is a manor, a barton, and a parish of Ashton, and there is nothing specific till the evidence is admitted. In Cheney's case the general doctrine is well stated, but it does not make for their argument. Mr. C. says that this was not a devise of the whole of the maternal property, but I do not see why the whole may not pass under the name of the Ashton Estate. Such was the testator's intention, which cannot be carried into effect unless the decision is for us. I do not admit that *at* has the same meaning as *of*, because *at* is local; but, even if it were *at* here, the question has never been fully decided. The Court were equally divided in *Whitbread v. May*, and the case of Dormer would bear me out even if the word were *at*. The question in *Doe v. Collings* was not merely a question of construction. Mr. C. contends for the rule that no evidence can be admitted where the will can have any operation without it. But I have cited cases

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Wyndham v.
Wyndham,
Godbolt, 16.
And. 58.
3 Maul. Sel.
171.

5 Rep. 68.

Whitbread v.
May, 2 Bos.
Pul. 593.
2 T. R. 498.

Feb. 25, 1816. to show that there is no such restriction. The case of *Pyot v. Pyot*, 1 Ves. 335. does not at all affect the point, and the case of *Ulrich v. Litchfield* has been often over-ruled. I do not quarrel with the rule that evidence shall not be admitted to contradict the instrument. The object in the case of *Beaumont and Fell*, 2 P. Wms. 140. was to get rid of the Christian and surname; that case was a great deal stronger than the present, and the principle must have been that, if the testator did not err in the person but in the name only, the person shall take. But I have found no rule that evidence shall not be admitted where the will can possibly operate without it, except in the case of *Doe v. Oxenden*. I cited the cases of *Harris v. Bishop of Lincoln*, and *Day v. Trigg*, and admitted that where part of the description must be rejected the rule takes place, as the admission would be to contradict the will. The case of *Wyndham v. Wyndham* falls within that exception. As to the observation that the effect of our doctrine would be that the intent of the testator would be collected not from the will but from evidence *dehors*, I do not contend that where there are legal technical words evidence is to be admitted to alter their meaning. But *Ashton* is no technical, but a popular description; and Lord Kenyon in the case of *Lane v. Earl Stanhope*, 6 T. R. 345-352. says, "Where certain words have obtained a precise technical meaning we ought not to give them a different meaning; but if there be no such appropriate meaning, &c., we ought to construe the words so as to give effect to the intent." The case of *Brown v. Selwyn*, Ca. Temp. Talb. 240. has no

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2 Atk. 373.

3 Taunt. 147.

application here, as the evidence was there offered Feb. 25, 1816. to contradict the will. Is it clear, if the evidence should not be received, that the will may not be void for uncertainty? And if so, it ought to be received even on the rule in *Doe v. Oxenden*. The intent to devise the whole is clear, and if one may give his estate any name he pleases and devise it by that name, the judgment must be for us.

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Lord Eldon (C.) The case which your Lordships have just heard is of too much importance for you to proceed to judgment upon without the deliberate advice of the Judges; and I mean to conclude the few words which I now offer with a question, the answer to which will, I trust, bring that advice fully before you. In the mean time I shall endeavour to clear the question of such cases as one hears most of, not at law but in equity; and to begin with the case of *Dormer*, I have now before me all that is necessary to prove what was the meaning of that case; not only a copy of the Register's book relative to that case, but also Lord Nottingham's manuscript notes of what he himself conceived his decision to be.

Dormer v. Dormer,
Finch, 432.

The report of that case stated that *Dormer*, the testator, was possessed of personal estate of considerable value, and entitled to a considerable real estate in Bucks, and also of estates in Hampshire and Sussex, formerly the Banisters. But *Idsworth* in Hampshire, being the ancient seat of the family, he usually comprehended the whole of the Hampshire and Sussex estates under that name. He made his will in these words:—after some expressions of

Feb. 25, 1816. piety, he says: "as to my temporal estate it is my
 " will that after my mother's decease the interest of
 " my estate at Idsworth"—and then in a paren-
 " thesis " (intending the whole Banisters) shall go
 " towards payment of my debts, and afterwards
 " towards raising my children's portions in manner
 " following. First, I bequeath my eldest daughter
 " Mary, 1500*l.* *item* to my two daughters, Margaret
 " and Elizabeth, 1500*l.* to be divided between them.
 " And if it shall please God that one of them die
 " (meaning before twenty-one years or marriage)
 " then the survivor to have 1000*l.*, and if both die
 " (meaning as aforesaid) then it is my desire that
 " 500*l.* part of the said 1500*l.* be given to my said
 " daughter; 500*l.* to my son Robert; 500*l.* to my
 " son William, and if it please God my daughter
 " Mary die (meaning before twenty-one or marriage)
 " then her portion to be equally divided amongst
 " my surviving children." And then followed the
 material words, which were wanting in the printed
 Report, by which he devised the whole Banisters,
 or the estates in Hampshire and Sussex, to his son
 Robert, the debts and portions being first paid. The
 decree states "upon reading the depositions, &c.;"
 these were merely that the testator was of sound
 mind, memory, and understanding, and no other de-
 positions were mentioned; and then it was held that
 the whole of the Banisters were by the will made
 liable to the debts and portions. Lord Northingham,
 in his notes written for his own use, states the
 points ruled in the case; and, as far as concerns the
 present case, the decision is—that where a testator
 devises his estate at H. for payment of debts and

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The reporter
seems to have
copied the will
from the bill;
and the words
in parentheses
were under-
stood by the
judges to be
the surmise of
the party, and
not words of
the original
will.

portions, and devises Blackacre to his son Robert, Feb. 25, 1816.
his debts and portions being first paid, Blackacre
 is made liable to the debts and portions, though not
 in H., and that was the circumstance which made
 it liable ; so that this case of Dormer in Finch is no
 authority at all for the plaintiff.

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Finch, 432.

Your Lordships have heard cases cited as to pre-
 sumption, satisfaction and election, and so forth. It is true that it is a rule that where a testator gives
 a legacy to his creditor equal to, or greater than, the
 debt, the presumption is that it is meant as a satis-
 faction of the debt. So where a person is bound by
 settlement to give a portion, and gives such a por-
 tion by will, it shall be presumed *prima facie* to be
 intended in satisfaction of the obligation. But evi-
 dence is admissible to rebut the presumption. That
 however is not admitted to alter the legal effect of
 the terms of the will, but only to show whether
 what is given by the will is not a satisfaction of
 that which is claimed by some other title. With
 respect to election, I decided the case of Druce and
 Denison, and stated that the subject as to which the
 election is to be made must be clearly described in
 the will. I there too stated my opinion of the
 decision in *Pulteney v. Lord Darlington*. But,
 with that case and the other authorities before me,
 I thought it right to decide as I did, subject to any
 review in case it should be deemed fit to attempt to
 shake these authorities, unless the parties felt that
 there was some weight in another observation, that
 the paper there in dispute was of such a testamen-
 tary species that it would be received in the proper
 Court as part of the will ; and if so, there would be

Druce v. De-
 nison, 6 Ves.
 385.

Pulteney v.
 Darlington, 2
 Ves. Jun.
 544.

Feb. 25, 1816. an end of all question. The parties seem to have thought that there was some weight in this last observation, and the matter was no more heard of. But as to that decision of Lord Thurlow, speaking with the utmost deference, I doubted its soundness, and I have Lord Loughborough with me. And as to the case before Lord Kenyon, the name of which, I think, was *Andrews and Lemon*, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had a power to dispose of by deed or will) for purposes for which his own was insufficient, Lord Kenyon sent it to the Master to inquire whether by personal property he meant his own strictly, or intended to include both. But when the evidence was taken, he was so much struck with his own decision that he said, "though the evidence has been taken I shall not now admit one word of it:" it being necessary for the general interests of mankind that persons should in their wills state clearly what they mean. So far as to cases in equity. No doubt where there is a latent ambiguity it may be explained by evidence, as where a testator gives to his son John 20*l.* for instance. There is no apparent ambiguity there. But if he has two sons of the name of John, that ambiguity may be taken away by verification of the fact. But here it is "my estate *of* Ashton;" whether *of* is equivalent to *at* will be for your Lordships to determine. But suppose this to be "my estate of Devon," would it be competent to admit evidence to show that the testator meant to include lands in Dorset on the one

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Pulteney v.
Lord Darling-
ton, 2 Ves.
Junr. 544.

Andrews v.
Lemon, by
Kenyon,
M. R.

side, and Cornwall on the other? If then a devise of Feb. 25, 1816.
 my estate of Devon would not let in evidence to
 show that lands in the counties of Dorset and
 Cornwall were included, why should a devise of "my
 "estate of Ashton" let in evidence to show that lands
 were included which were not in the parish of
 Ashton. But the difficulty is how far, where there
 is a local description of lands, you can extend that
 to what the description naturally comprehends. I
 say nothing on the evidence itself—only that the
 effect of it may be looked at thus far, to see how far
 it may be dangerous to admit such evidence. But
 that is not now the question. The question which
 I submit to your Lordships, as proper to be put
 to the Judges, is this: "whether the evidence
 "tendered is such as according to law ought to be
 "admitted for the purpose for which it is offered."

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Question to
 the Judges.

Gibbs (Ch. J.) (delivering the opinion of all the Judges, June 12, 1816.) This case arose upon an action of ejectment, brought to recover possession of lands and hereditaments, claimed under the will of the late Sir John Chichester, as devised, under the name and description of the deviser's "estate of Ashton." The ejectment was tried before Baron Graham, when certain evidence was offered on the part of the plaintiff which the Judge thought inadmissible; and thereupon a bill of exceptions was tendered, and sealed and signed by Baron Graham; and in that bill of exceptions the evidence is stated upon which the question arises.

The will of Sir Arthur Chichester runs in these words: "I give my estate of Ashton, in the county wal.

June 12, 1816. " of Devonshire, to George Chichester Oxenden,
 " second son of Sir Henry Oxenden, Baronet, of
 " Broome in the County of Kent: I give my house
 " in Seymour Place, for which I have given a
 " memorandum of agreement to purchase, and
 " which is to be paid for out of timber which I
 " have ordered to be cut down, to the Rev. John
 " Sanford, of Sherwell, in Devonshire."

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The ejectment was brought to recover lands situate in the county of Devon, but not in Ashton; and it was insisted that under these words, "my estate of Ashton," the testator intended to comprehend these lands, though not in Ashton, and that they passed under the will of the devisor. And evidence was tendered to show that the testator, in conversation and otherwise, comprehended under the name and description of his estate of Ashton, not only his lands in Ashton, but other lands, or the whole of the estate which he derived from his mother, and that he spoke of his paternal estate as his Youlston estate. And the question submitted was, whether extrinsic evidence could be received to explain the devise, and to show that it included lands not situate at Ashton; for we are all agreed that there is no distinction between *of* and *at*, and that it makes no difference whether the words are "my estate *of* Ashton," or "my estate *at* Ashton."

Whether *of*
or *at* Ashton
makes no dif-
ference.

I do not state the particulars of the evidence, as the question is, whether any evidence at all can be admitted to explain the bequest. We are all agreed, as I have stated, that "my estate *of* Ashton" and "my estate *at* Ashton," are words of the same import, and the question then is, when lands at a par-

Where lands
at or of a parti-

particular place are devised, whether extrinsic evidence may be received to show that the devisor included lands out of that place; and we are all of opinion that such evidence is inadmissible.

The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show which of them the testator intended. And so also if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of such extrinsic evidence should be avoided where it can be done, that a purchaser or an heir at law may be able to judge from the instrument itself what lands are or are not affected by it.

Here the devise is of all the devisor's estate at Ashton; for there is no difference between *of* and

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particular place are devised, extrinsic evidence is not to be admitted to show that the devisor meant to include lands not in that place.

Extrinsic evidence to explain a will is admissible only where an ambiguity is raised by extrinsic circumstances.

And then such evidence is admissible only because it is necessary in order to give effect to the will.

June 12, 1816. *at*, and he has an estate at Ashton which satisfies the description. It is true he has other lands which came to him along with his estate of Ashton; but they are not therefore comprised in the words "my estate of Ashton." If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of these counties; and for the same reason, when the testator here describes the lands as his estate of Ashton, you cannot receive extrinsic evidence to extend this to other lands not of Ashton.

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Dormer v. Dormer,
Finch, 432.
The reporter
has confound-
ed the facts of
that case with
the surmise of
the parties.

Facts and
grounds of de-
cision of the
case of
Dormer in
Finch, 432.

We were pressed a good deal by the case of *Dormer* in *Finch*, where it was stated to have been determined that by a devise of lands at Idesworth, lands out of Idesworth were also intended and included in the devise. There is some obscurity in the case as reported. The statement appears to have been transcribed from the bill, and the reporter has confounded the surmise of the parties with the facts of the case. The facts in substance are these; *Dormer* died possessed of personal estate of considerable value, and seized of real estate in Buckinghamshire, and also, of real estates in Hampshire and Sussex, formerly called the Banisters, and Idesworth, the family-seat in Hampshire, was part of the Banisters estate. By his will he directed that the rents of his estate at Idesworth should go to pay debts and raise children's portions. In *Finch* it is stated thus: "It is my will, that after my mother's decease, the interest of my estate at Idesworth (intending the whole Banisters) shall go towards payment of my debts, and afterwards towards

“ raising my children’s portions, &c.” The words *intending the whole Banisters*, the statement being taken from the bill, are only the suggestion of the party. The fact is merely that he directed that the interest of his estate at Idesworth should go towards payment of debts and portions. In a subsequent part of the will he directs that his son Robert shall have the Banisters, the debts and portions being first paid. It was certainly a question in that case, whether the whole Banisters estates were affected by the debts and portions; and the object of the bill was so to charge them. The answer was, that, under the will, the estate at Idesworth only could be affected by the debts and portions, while on the other hand it was insisted that it was the testator’s intention to include the whole Banisters. To make that case applicable to the present however, it must appear that extrinsic evidence was received to show the intention. But, instead of that, the contrary appears; for the evidence of the only two witnesses examined in that case was confined to the sanity of the testator at the time of making his will. The Lord Chancellor does indeed determine that the whole Banisters were affected; not because of evidence admitted to show that it was the testator’s intention, nor because it appeared in any way to be his meaning to include the whole under these words “ my estate at Idesworth,” but because in another part of the will the testator gives the whole of the Banisters to Robert his son, or brother, *after the payment of the debts and portions*, which showed the intention of the testator, that the whole Banisters should be charged. So far then as that case is an authority, it amounts

June 12, 1816.

EXTRINSIC
OR PAROL
EVIDENCE
NOT ADMIS-
SIBLE TO EN-
LARGE THE
EFFECT OF
THE TERMS OF
A WILL.

June 12, 1816.

EXTRINSIC
OR PAROL
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A WILL.

merely to this, that if one part of a will charges one estate with payment of debts and portions, and another part charges another estate, then both are charged. The testator there by one clause charged his estate at Idesworth, and by another clause charged the whole of the Banisters.

Having removed that case out of the way, we are all of opinion, that there is nothing to impugn the general rule, that, unless in cases where there is a latent ambiguity, parol or extrinsic evidence is not admissible to explain a will.

Lord Eldon (C.) When this case was argued at your Lordships' bar it was contended for the plaintiff, that the extrinsic evidence ought to have been received; and that if it had been received the verdict would have been clearly for him: and for the defendant it was contended that the evidence ought not to have been received, and was properly rejected; and that, though it had been received, it did not follow that the verdict ought to have been against him.

Whether in case the evidence had been received the verdict ought to have been the one way, or whether it ought to have been the other way, are questions with which your Lordships need not trouble yourselves, provided you concur in the opinion delivered by the Judges. Speaking for myself, I have only to say that such is clearly my individual opinion, and that, upon the question that this judgment be reversed, I shall vote that it be affirmed.

Judgment affirmed.

Agents for Plaintiff in error, HARMAN AND NEWBY.

Agents for Defendant in error, ANSTICE AND COX.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

REID and Co.—*Appellants.*HARVEY AND OTHERS—*Respondents.*

INSURANCE “on goods *per* Nancy, Captain Johnson, from June 19, 24,
 “Lisbon to Clyde, premium ten guineas per cent., to re- 1816.
 “turn five per cent. for convoy and arrival.”

By instructions to make insurance, and a representation in these terms, the underwriter is made to believe that there is a chance of the vessel's sailing with convoy, and that he undertakes an alternative risk. And the contract is not an insurance at the higher premium against all hazards, independent of the chance of the diminished risk, though at a lower premium; but the alternative is a constituent part of the contract, and a material part, because, though the underwriter undertakes the entire risk at the higher premium, combined with the chance of diminished risk with a lower premium, the entire risk, standing alone without the chance or alternative, might be one which he would not undertake at the higher premium, or would not undertake at all. And therefore, where parties procured insurances to be effected upon a representation as above, knowing at the time that the vessel was to be a running ship, and, before the last insurance was effected, that she had, in fact, sailed without convoy, but not communicating these facts to the underwriters, it was held to be a concealment of fact material to the risk, and that the policies were void.

INSURANCE.
 —FRAUD.—
 RETURN OF
 PREMIUM.

REID and Co., merchants, Glasgow, having ordered a cargo of fruit from Lisbon, their correspondents at that place, Slack and Co., wrote them a letter, dated December 22, 1798, which, as far

June 19, 24, as it related to the matter in question, is in these
1816.

terms :—

INSURANCE.

—FRAUD.—

RETURN OF

PREMIUM.

Letters of ad-
vice, Dec. 22,
1798, received
Jan. 7, 1799.

“Small vessels in general are become so scarce
“that we really began to despair of finding an op-
“portunity to comply with your orders ; particu-
“larly as no foreigner would venture going so far to
“the north at this time of the year. We were,
“indeed, most shamefully disappointed *per* last
“convoy, when we had engaged room for sixty
“chests, we meant on joint account ; but, fortu-
“nately, when we least expected it, we have had
“the good luck of meeting with a charming
“little schooner, the *Nancy, Johnson, (a prize,*
“*going home for condemnation)* we calculate will
“carry, &c.

“Two or three days fine weather will put this
“vessel ready for sea, her cargo being all made up.
“This for your government regarding insurance,
“*with or without convoy, for which she shall not*
“*wait a single day.*

“P. S. *We have determined on running with*
“*the Nancy.*—To-morrow you may calculate will
“sail about the 30th at farthest.”

On the same day, a letter was addressed to the
Appellants, by Mac Andrew and Gill, another
house at Lisbon, with which they corresponded, in
the following terms: “Gentlemen, We had this
“honour the 7th instant, and have now to advise,
“that we have procured freight for 100 chests
“china oranges, and 150 fraills figs, on board the
“British vessel, *Nancy, Captain Robert Johnson,*
“which we expect will sail in all this month, and
“will carry for your account the above goods.

"The amount of invoice for your government in June 19, 24,
 "insurance may be about 530//000. There being ^{1816.}
 "no convoy at present appointed for Britain, *the* ^{INSURANCE.}
 "*Nancy intends to run it.* However, should any ^{—FRAUD.—}
 "partial convoy offer, she will naturally benefit of ^{RETURN OF} PREMIUM.
 "it."

Reid and Co. received these letters on January 7, ^{Order for in-}
 1799, and on the 16th gave their broker an order ^{surance, Jan.}
 for insurance in the following terms; quoting some ^{16, 1799,}
 words from the first letter of advice, but omitting ^{omitting in-}
 the information that she was a prize going home for ^{formation that}
 condemnation; "Sir, Please make insurance for ^{vessel was a}
 "200*l.* sterling *on fruit*, by the Nancy, Captain ^{prize, &c.}
 "Johnson, of and from Lisbon for Clyde, *premium*
 "*ten guineas, to return five per cent. for connoy*
 "*and arrival.* The Nancy is a charming little
 "schooner, and our friends advise, would be ready
 "for sea by 31st ultimo."

A policy was accordingly opened, and under-
 written by the Respondent Harvey and another.
 The terms of the policy, as far as concerns the
 present question, were: "The fruit and goods on
 "board the said ship, or schooner, Nancy, Robert
 "Johnson master, are insured in a voyage from
 "Lisbon to Clyde, the adventure to begin, &c.;
 "*the premium being at the rate of ten guineas per*
 "*cent., to return five per cent. for connoy and*
 "*arrival.*" The words in the first letter, "with
 "or without convoy," not being in the policy.

On January 5, 1799, Messrs. Robert Slack and ^{Other letters}
 Co. again wrote to the Appellants, informing them, ^{of advice, Jan.}
 that "the Nancy only finished loading the day ^{5, 1799, re-}
 "before yesterday, when she immediately dropped ^{ceived Jan.} 22.

June 19, 24,
1816.

INSURANCE.
—FRAUD—
RETURN OF
PREMIUM.

“down to Bellim, and, we hope, got over the bar
“this morning. She is a nice little schooner, and
“we doubt not will have *a safe and very short*
“*run.*”

Messrs. M^cAndrew and Gill, wrote them also on
the same day ; “ We have now the pleasure to en-
“close your bill of lading for your 100 chests
“China oranges, and 150 frail figs, shipped for
“your account on board the Nancy, Captain
“Johnson, which we expect will sail to-morrow for
“Greenock direct. The detention we did not ex-
“pect, when wrote you last, would have been so
“great, but could not be avoided, from the inter-
“vention of our holidays, and indifferent weather.”

Insurance,
Jan. 22, 1799,
cancelled.

These letters were received on January 22, 1799,
and on that day instructions were given for another
insurance “on goods *per* Nancy, Johnson, from
“Lisbon to Clyde, premium ten guineas per cent.
“to return five per cent. for convoy and arrival ;”
and on this representation another policy was
opened and underwritten by M^cCulloch and Millar ;
but they, on the next day, insisted on having the
policy cancelled, as they had understood, when
they underwrote it, that the vessel was to sail with
convoy, whereas they had since learned that she
was a running ship ; and they were liberated.

Second insur-
ance, Jan. 24,
1799.

On January 24, the broker obtained instructions
to procure insurance on goods “*per* Nancy, John-
“son, from Lisbon to Clyde ; premium ten guineas
“per cent., to return five per cent. for convoy and
“arrival. The Nancy finished loading on 3d
“instant, when she dropped down to Bellim, and
“was expected to get over the bar on the 5th in-

"stant." Another policy, in the same terms as June 19, 24, before, was underwritten upon this by others of 1816.

A letter from Lisbon, to Reid and Co. dated January 12, and received on the 27th, stated :—

"*The Nancy, Johnson, sailed early on the 7th.*"

"*The vessel we supposed would follow is now to*"

"*wait convoy.*" Reid and Co. got a third policy

in the same terms, underwritten on the 28th, by

Harvey and others, under similar instructions as

before, with this addition :—"By letter of the 12th

"instant, advice is had that the *Nancy* sailed the

"7th instant."

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

Another letter of advice, dated Jan. 12, received 27th, stating that the vessel had actually sailed without convoy, and a third policy effected as before.

The vessel was taken on January 12, by a Spanish Privateer. On February 14, whether before or after advice of the loss did not appear, the underwriters took a formal protest against the assured, and demanded to be relieved from the policies, on account of concealment of material facts and circumstances. The assured then commenced an action in the Court of Session against the underwriters, for payment of the sums insured ; but, after several proceedings and a proof taken, this action was dismissed, as the cause ought to have originated in the Admiralty Court. Reid and Co. accordingly brought an action in the Admiralty Court, and obtained decree in absence against the underwriters, who then brought an action of reduction of this decree in the Court of Session. The cause then was allowed to fall asleep, but was awakened in 1808. Though in this last action the underwriters must have been the pursuers, yet, in the subsequent proceedings in the Court of Session,

The vessel captured.

1800, 1801.
Proceedings
in Courts of
Session and
Admiralty.

June 19, 24, 1816. the assured were described as the pursuers, and the underwriters as the Defenders, as in the original action. The circumstance was mentioned at the bar on appeal, but did not seem to be considered as material.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

3 Burr. 1905-
9, and 1
Blacks. Rep.
593.

In the memorials and proceedings below there was much discussion as to the general principle of the law of insurance relative to communications by the assured to the underwriter, and, in addition to various passages quoted according to their practice from writers on insurance, the observations of Lord Mansfield, in *Carter v. Boehm*, were relied upon on both sides ; and for the underwriters, the cases of *Fellowes v. Schneiders*, before Lord Kenyon ; and *M^r Adam v. M^r Evoy*, before Lord Ellenborough ; and the cases of *Keay v. Young*, in the Court of Session, November 1783, were also cited. And with respect to this particular case, the question was whether there was a wrong representation or a concealment of circumstances material to the risk, and in the knowledge of the assured at the time when the insurance was effected.

As to the matter of concealment, Maccullock and Millar, whose insurance had been cancelled, were examined as witnesses, and stated that they had understood from the nature of the representation made to them that the vessel was to sail with convoy ; and Maccullock stated that after having seen the letters, he was confident no one would undertake the risk for less than twenty guineas.

The Lord Ordinary, and Court of Session (first division) by its first interlocutor found for the underwriters. By another interlocutor, the Court

found for the assured—but ultimately by inter-locutors, June 27, 1812, and June 25, 1813, decided for the underwriters, and the assured appealed.

June 19, 24,
1816.
INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

The question on the appeal was whether there was a wrong representation or a concealment of facts and circumstances material to the risk, and in the knowledge of the assured at the time the insurance was effected, by the suppression of these two particulars: 1st, That the vessel was a prize coming home for condemnation, and therefore not within the provisions of the convoy act, 38 Geo. III. cap. 76.—2d, That the vessel was intended to be a running ship.

June 27, 1812.
June 25, 1813.
Judgment in
Court below
for the under-
writers. Ap-
peal.
Questions and
argument on
appeal.

Mr. Leach and *Mr. Horner* (for the Appellants) argued, as to the 1st point, that the circumstance whether the vessel was British or foreign, within or without the provisions of the convoy act, was one of those of which the underwriter took the knowledge upon himself; of which he might have informed himself by making proper inquiry, and as to which, if he did not inquire, he must be considered as having waived any information. It was therefore a circumstance which, though within the knowledge of the assured, he was not bound to communicate, and the cases of *Long v. Duff*, and *Long v. Bolton*, were cited. As to the 2d point—whether the assured were bound to communicate the probability that the vessel would sail without convoy when they effected an insurance with these words in the policy after the long premium: “to return five per cent. for convoy and “arrival,” there appeared to be no decided case

2 Bos. Pull.
209.

June 19, 34,
1816.

INSURANCE.
— FRAUD.—
RETURN OF
PREMIUM.
Doug. 255.

applying exactly to that point in the present case, as the question in the case of *Simond v. Boydell* turned upon the point of arrival. That appeared to have been the first case in which this form of words in a policy were brought particularly under the notice of the Court, and the case was spoken of as one of great authority by Lord Kenyon and Sir James Mansfield.—Lord Mansfield there said, “ dangers “ of the sea are the same in time of peace and of “ war. But war introduces hazards of another sort “ depending on a variety of circumstances, some “ known, others not known, for which an additional “ premium must be paid. Those hazards are dimi- “ nished by the protection of convoy, and if the “ insured will warrant a departure with convoy, “ there is a diminution of the additional premium. “ If the insured will not warrant a departure with “ convoy, he pays the full premium, and in that “ case, the underwriter says—if it turn out that the “ ship departs with convoy, I will return part of the “ premium.”—Now suppose the assured did know in this case that the vessel was to run without convoy, the question was whether it was material to the risk here insured. The contract was in its terms an insurance against all hazards of sea and war, with a proviso that in case the war risk should be diminished, there should be a diminution of the war premium. Then how could the concealment of the fact be material to the risk since there was a distinct contract on the face of the instrument applicable to the event of sailing without convoy? But the assured were apprized that if convoy offered, the vessel would naturally take the advantage of it, and there-

fore provided for that alternative. Then looking at ^{June 19, 24,} the case, on the principle, where they had no deci- ^{1816.} sions to guide them, this was a contract of indem- ^{INSURANCE.} nity against all hazards, where the parties looked at ^{—FRAUD.—} the whole risk, and distinctly provided against it; ^{RETURN OF} with the addition that if the whole risk did not ^{PREMIUM.} take place, the premium should be proportionably diminished.

Sir Samuel Romilly and Mr. Adam (for the Respondents, the underwriters) argued as to the 1st point, that the fact of the vessel being a prize ship coming home for condemnation, was clearly material, and the case in C. P., *Long v. Duff*, did ^{2 Bos. Pul.} not touch upon the present case, because there it did ^{209.} not appear that the assured knew that it was a foreign ship—and though they had known it, the vessel was British owned, and the proper information might be procured at Lloyd's by the underwriter. There was a wide difference between that and a prize ship coming home for condemnation, which had never been in a British port—and by the words "from Lisbon to Clyde," in the representation and policy they gave the underwriters reason to think that she was a British trader coming home to the Clyde. As to the 2d point, the inference from the words "premium ten guineas per cent. to "return five per cent. for convoy and arrival," must have been that there was a strong probability that she would sail with convoy, though there was a possibility that she might not. The observations of Lord Mansfield, in *Simond and Boydell*, did not ^{Doug. 253.} apply here. The meaning of his Lordship's words

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1816.

INSURANCE.
—FRAUD.—
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PREMIUM.

was this—if the assured will not *warrant* a departure with convoy, he must pay the full premium ; but though the assured will not warrant, yet as there is a strong probability that she will sail with convoy, if she does in fact so depart, then the underwriter engages to return part of the premium.—The words “ to return 5 per cent. for convoy and “ arrival,” were not mere words of style, but carried an intimation that the vessel would probably sail with convoy ; and there was a representation too that the vessel had dropped down to Bellim, the place where vessels usually joined convoy. The assured knew all along, however, that she was intended to be a running ship, and by the letter received previous to effecting the last insurance, they knew that she had actually so sailed, but did not communicate the circumstance. Now every circumstance which might affect the judgment of a prudent man, as to undertaking the risk, ought to be communicated, unless it was one of those which the underwriter himself might equally know, and must be presumed to know, or to have waived the information. The circumstance of her being a prize ship coming home for condemnation, would clearly vary the risk, on account both of her not being within the provisions of the convoy act, and the state of the vessel as to seaworthiness. The circumstance of her being intended to be a running ship would also clearly vary the risk—and therefore both circumstances ought to have been communicated ; for though the underwriter, under the impression that the vessel was British, and that she would probably sail with convoy, undertook the alternative risk ; it

did not follow that if he had known she was foreign, and was intended to be a running ship, that he would have undertaken the risk at the same premium, or that he would have undertaken it at all.

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

Mr Leach (in reply) still contended that the contract was in its nature an insurance against all hazards, with a note in favour of the insured, in case the hazard happened to be diminished.

Lord Eldon (C.) This is a case of insurance on goods “by the Nancy, Captain Johnson, from Lisbon to Clyde at a premium of ten guineas per cent., to return five per cent. for convoy and arrival.” The appeal is brought against a judgment of the Court of Session, finally sustaining the defences and assoilzieing the defenders (the underwriters), holding in effect that there was a want of good faith on the part of the assured, and that the representation was wrong.

Judgment,
June 24, 1816.

Two objections were made to that representation; 1st, because it was not mentioned that the vessel was a prize ship coming home to be condemned. I would not be bound by any opinion I might state on that point, but as to the other objection I have no doubt that it is a good one, and that the Court of Session is right.

The information received by the Appellants was, that this was to be a running ship; they however did not effect an insurance of that nature, but got two or three policies underwritten, by instructions to their broker to make insurance on fruit or goods “by the Nancy, Captain Johnson, from Lisbon to

June 24, 1816. "Clyde, premium ten guineas, to return five per cent. for convoy and arrival." It is remarkable that in all the letters to the Appellants the vessel was described as a running ship. Yet after the Appellants knew that she had actually sailed without convoy, one of the policies was effected on this sort of representation "premium ten guineas, *to return five per cent. for convoy and arrival,*" and it was impossible that these last words should not be considered as having some meaning.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

Now I think the general understanding would be that vessels so insured would sail with convoy, though some might possibly sail without, and the underwriter says "I take the risk altogether, with the chance of the vessel sailing with convoy."

The underwriter made to believe that he undertook an alternative risk, whereas it was known to the assured at the time of insurance that there was no alternative.

But if he had not this alternative and knew that she was to sail or had sailed without convoy, he might not take the risk at ten guineas, as he only took it at ten guineas with the chance of her sailing with convoy, though in that case and on arrival he was to return five per cent. So that he takes the risk altogether, upon an understanding that there may be a sailing with convoy, whereas without that alternative he might not take the risk at ten guineas, or might not take it at all.

Appeal dismissed, and Judgment *affirmed*.

Agent for Appellants, CAMPBELL.

Agent for Respondents, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MONTGOMERIE (Lord and Lady)—*Appellants*.
 WAUCHOPE—*Respondent*.

A TRUSTEE, tutor, and curator, appointed cashier and agent March 27, 29; to the trust by co-trustees, and when called upon to account, produces accounts made up by accountants from his own instructions. Lord Ordinary appoints objections of a general and preliminary nature to be stated to the accounts, reserving the examination of particulars and vouchers till these should be disposed of. Objections given in that the accounts were not annually balanced, that interest was allowed only at $3\frac{1}{4}$ per cent., whereas interest ought to have been calculated at three per cent *de die in diem* from time of receipt till three months after the annual balance, and then on the balance at five per cent. and the right to demand all the profits stated but not insisted on, that a charge was made for the service of the accountants which ought to be paid by the trustee and agent as it was by his negligence in not keeping the accounts himself that their services became necessary, that his charge for his own trouble in the management was excessive, and that a charge made for making up titles to certain lands by adjudications in implement, without general service and decree of constitution, ought not to be allowed, as the titles were improperly completed and therefore useless. After several proceedings, final interlocutor below approving the accounts *in toto* without any examination of particulars. This last interlocutor reversed as inconsistent with the reservation in the Lord Ordinary's interlocutor which was not appealed from, and the cause remitted for review as to the rest, so that the claim for all the profits might be insisted upon if that question was still open.

The Lord Chancellor observing that he could not conceive how it came to be imagined that the accounts ought not to be annually balanced, that it was new in principle to take

April 1, 8,
 1816.
 TRUSTEES,
 TUTORS,
 CURATORS—
 HOW TO AC-
 COUNT.

March 27, 29;
April 1, 8,
1816.

TRUSTEES,
TUTORS,
CURATORS—
HOW TO AC-
COUNT.

accounts made up under the directions of one alone of the parties as a ground for judicial proceeding, that the appointment of a trustee by co-trustees to be cashier and agent to the trust to be paid as cashier and agent could hardly be supported in England, that a trustee ought to keep his accounts so regularly at least as to enable the Court to judge how far the assistance of professional accountants might be necessary in the particular case, but that a trustee acting *bond fide* with a view to the interest of the *cestui que trust* ought not to suffer for mistake unless he very grossly miscarried.

THIS was a question as to the principle and mode of accounting by a tutor, curator, and trustee, who was also agent and cashier for his colleagues in the guardianship and trust, with the pupil and truster.

1796, death of
Lord Eglinton,
and leaving
two daughters,
the elder
ten years of
age.

Archibald, late Earl of Eglinton, died in 1796, leaving two daughters. Before and at the time of his death he was entitled to and possessed of a very large estate real and personal of his own acquisition, besides two entailed estates, one of which by the destination went to his cousin the succeeding Earl of Eglinton, the other to his elder daughter Lady Mary Montgomery. By a deed of nomination of Feb. 8, 1788, and a disposition and settlement of Jan. 18, 1791, Earl Archibald had appointed Sir James Montgomery the Chief Baron of the Exchequer in Scotland, Sir Archibald Macdonald, then Solicitor General, afterwards Lord Chief Baron of the Exchequer in England, and others, amongst whom was John Wauchope writer to the signet, to be tutors and curators of his daughters, and trustees of his fortune for their benefit.

Appointment
of trustees,
tutors, and cu-
rators, of
whom Re-
spondent was
one.

Wauchope had in the Earl's life time been his

cashier and agent and had made up his accounts, March 27, 29; and regularly struck a balance annually. It was thought proper by the other tutors and trustees that Wauchope should continue to take the active management of the property as agent and cashier, and his powers as such were renewed by them with a recommendation to keep his accounts in the same regular manner as in the Earl's life time.

April 1, 8,
1816.

TRUSTEES,
TUTORS,
CURATORS—
HOW TO AC-
COUNT.

Respondent
appointed
cashier and
agent by his
co-trustees,
&c.

Lady Mary the elder daughter, who was only ten years of age in 1796 when her father died, was in 1803 at the age of sixteen or seventeen years married to her cousin Lord Montgomerie, son of the present Earl of Eglinton; her father's wishes expressed in his last illness being in that respect complied with. Lady Susan, the other daughter, died in 1805, in minority. In 1806 Lord and Lady Montgomerie determined to settle with the trustees, and for the purposes of that settlement an action of multiple-poin ding was in 1807 instituted in the names of the trustees, in which all proper parties were called, that the trustees might account and be judicially exonerated.

1803. Marri-
age of elder
daughter at
age of sixteen
years.

1806. The
elder daughter
and her hus-
band proceed
to close the
trust.

Action of
multiple-
poin ding.

Wauchope, by appointment of the Lord Ordinary, then produced an account of his intromissions as cashier and agent, prepared under his own instructions, by Messrs. Keith and Wilson, professional accountants. Wauchope, it appeared, had not made up his accounts annually, and had rendered none to the tutors and trustees till 1806, and in the accounts prepared by Keith and Wilson no annual rests had been made, nor annual balances struck.

Respondent
produces ac-
counts made
up by account-
ants under his
own instruc-
tions.

The Lord Ordinary by interlocutor of Jan. 25,

Jan. 25, 1811.

Interlocutor of

March 27, 29; 1811, ordered Lord and Lady Montgomerie to give into process any objections of a preliminary and
 April 1, 8,
 1816.

TRUSTEES,
 TUTORs,
 CURATORS—
 HOW TO AC-
 COUNT.

Lord Ordinary, ordering objections to the accounts to be stated, if they should appear objectionable.

Four objections stated.

general nature which they might have to these accounts, before entering upon an examination of particulars and vouchers. This interlocutor was not objected to nor appealed from, and in compliance with it four preliminary objections were stated—1st, that the accounts were not annually balanced :—2d, that Wauchope had, instead of stocking out the savings, kept immense balances in his hands, for which there was no occasion in the ordinary administration, and allowed only $3\frac{1}{4}$ per cent. interest on these balances instead of 5 per cent. :—3d, that the charge for trouble and commission was extravagant, and that 420*l.* charged by Keith and Wilson for making up the accounts ought not to be allowed, as it was the neglect of Wauchope to make up his accounts annually that rendered their assistance necessary :—4th, that the charge for making up certain titles ought not to be allowed, as they were improperly completed and therefore useless.

Interlocutor of Lord Ordinary, Nov. 1812.

The Lord Ordinary by interlocutor, Nov. 12, 1811, first in part appealed from, found that the accounts ought to be annually balanced; and that interest on the balances ought to be charged at the rate of 4 per cent. and repelled the other objections.

Representations having been given in by both parties against this interlocutor, the Lord Ordinary made avizandum with the cause to the Lords of the first division, and informations having been lodged, the Court, by interlocutor, July 2, 1812 (second in

Interlocutor of Court, July 2, 1812.

part appealed from), found that the accounts must

be brought to an annual balance; and that, as to the balances, after allowing certain periods for stocking them out, interest should be charged at 5 per cent. ; but that no interest should be charged *de die in diem* till the expiration of these periods, and the Court repelled the other objections.

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Both parties reclaimed, and the Court, Nov. 12, 1812, ordered the petition for Lord and Lady Montgomerie to be answered, with the exception of the point of the expense of making up the titles as to which they adhered, and this part of the interlocutor was appealed from.

Interlocutor
of the Court,
Nov. 12, 1812.

After answers put in, the Court by interlocutor, Feb. 2, 1813, (fourth appealed from) approved of the whole accounts of Keith and Wilson, as they stood without examination of particulars or vouchers, and Lord and Lady Montgomerie appealed.

Interlocutor
of the Court,
Feb. 2, 1813.

Appeal.

The point chiefly contended for below on the part of the Appellants, after the matter of annual balance, was that interest should be charged on the sums received at the rate of 3 per cent. *de die in diem*, from the time of receipt until three months after the annual balance should be struck, and from that time at the rate of 5 per cent.—There were some passages in the pleadings below, touching upon the right of the Appellants to an account of all the profits made by the Respondent of the trust money; but this appeared to be stated rather as a right which might be, than as one which actually was, insisted upon.

Argument.

When the cause, however, came to be heard upon appeal, the point chiefly insisted upon for the Appellants was, that the Respondent ought to account

March 27, 29; for all the profits he had made of the infant's money. It was a principle of universal law, that a

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Europe was it ever heard of before, that when a trustee laid out the money, he should be allowed to retain the profits. The rule was essential in the character of a trustee, and no express institution was necessary. But in the civil law there was a prohibition against taking interest without accounting for it. Cod. lib. 5. tit. 56. *De usuris pupillaribus*.—

Forbes v.
Ross, & Bro.
Ch. Ca. 430.

Whatever interest the trustee made ought to be paid, and even though it should be proper to keep the money in deposit, if he did in fact make interest of it, he ought to pay it. A trustee cannot bargain, so as to gain an advantage for himself, out of the trust fund; and therefore where executors were directed to lay out the fund at the best interest, and they agreed that one of them should take it at 4 per cent. the executor was charged by the Court with 5 per cent. So here no authority of the co-trustees, if given, could protect Wauchope from accounting for the utmost interest. No principle could be more clear, than that a guardian ought to charge nothing for care and trouble, but only the money out of pocket. The principle of the office was, that it was a moral and honourary, and not a stipendiary office, and so it was clearly considered in Chancery, in this country, and in the civil law. There was a case, where a person, employed by a testator as a collector of rents, being made executor of his will, claimed an allowance for collecting the rents subsequent to the testator's death, on the ground that it

was so meant; but the Master disallowed the claim, as no intention could be imputed so far to take away the character of executor; and so here the character of cashier and agent ought not to be allowed to extinguish that of trustee. These are propositions of universal law, and as true at Edinburgh as at London; and if there was any doubt about the matter, it was of vast importance to have the point settled. Trustees might be proceeded against with more or less severity as to the charge of interest in particular cases; but this was the first time it was ever heard of, that a trustee should not be bound to account for the profits actually made by him of the trust fund. But it was a general and paramount principle of the law of Scotland, that a tutor, curator, guardian, or trustee, could make no profit whatever for himself of the trust fund. There was another subordinate principle, by which trustees, &c. were bound to use a certain degree of diligence, and this varied in its effects and consequences according to the change of times and circumstances. But the principle that the office of guardian and trustee was gratuitous, and that a person in that situation ought to derive no profit to himself from the trust fund, was universal and invariable. The authorities on the other side related merely to the different modes of acting on the subordinate principle without affecting the general and universal principle. The mode of dealing with the trust fund, and of accounting, laid down by these old regulations, however proper in other times and under other circumstances, was totally inapplicable to the present period, and present state and circumstances of Scotland. And then

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N. B. In this case a remuneration was not objected to, but only the amount of the charge.

March 27, 29; Stair. b. 1. t. 6. s. 17. 21.—Ersk. b. 1. t. 7. s. 19.—
 April 1, 8,
 1816. Bankton. b. 1. t. 7. s. 36.—*Scott* (of Rossie) *v.*

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Strahan (of Balgenny) *Elchies*.—*Murray v. Murray*, June 1710 :—and other cases stated in Dict. under title, *Pactum illicitum*.—*Lord Macdonald v. Mackenzie*, 1780, were cited.—By the principles of the law of Scotland then, the Respondent was bound to account for all the profits he made of the trust fund, and in accounting to bring his accounts to an annual balance, and pay interest, according to the course and practice of the country at the present time. Wauchope was liable to the penalties of stat. of 1672. cap. 2. for neglect of its regulations; but no penalties for the omission were insisted on, but only the profits which he actually made, or ought to have made. As the charge by the accountants for their services was occasioned by Wauchope's own negligence in not keeping his accounts so as to render their assistance unnecessary, he and not the Appellants ought to pay it.—His charge for his own remuneration was extravagant, (230*l.* per ann.) and he was at any rate precluded, by the terms of his appointment as cashier and agent, from charging more than was allowed him in the late Earl's lifetime, (100*l.* per ann.)—Then in making up the titles to certain lands by adjudications in implement, the general charge and decree of constitution were omitted, and the titles were unavailable, and the Appellants ought not to be charged with the expense.

For the Respondent it was argued, that the account of all the profits made, had never been asked below, and the Appellants had even made a merit

of not insisting upon it ; and now they called upon ^{March 27, 29;} their Lordships to decide a point which they had ^{April 1, 8,} excluded from the consideration of the Court be- ^{1816.}

low. The question was as to the rate of interest to be paid, and the annual balances ; and that was to be decided, not by universal and moral law, but by <sup>TRUSTEES,
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the law of Scotland ; and the rules as to balancing the accounts, and stocking out the receipts, and the interest to be paid, were stated in the authorities, *Campbell v. Lord Galloway*, Fac. Col. March, 1802.—*Ersk. B. 1. T. 7. S. 25.*—*Spalding v. Farquharson*, Fac. Coll. May, 1809. But Wauchope consented to pay interest according to the rate at which a prudent man would have made interest of his own money. Mr. Wauchope, as a medium between the interest allowed by the private and chartered banks, accounted at the rate of $3\frac{1}{4}$ per cent. *de die in diem*. It was not the duty of Wauchope to lay out the receipts on landed security, at 5 per cent. as then he might not be able to answer the exigencies which might occur. As to annual rests, even the law of England did not allow interest on interest except in special cases. At law it was only allowed where judgment was had for a sum composed of principal and interest, and then instead of execution an action was brought on the judgment ; interest was then given on the whole in the shape of damages. Equity did not go so far, as the decree only directed interest to be computed on the principal, and it was no settled principle that a trustee should account with annual rests. He paid the profits which he made, or interest, but ^{11 Ves. 92.} not on annual rests. The case of *Raphael v. Bo-*

March 27, 29; *et al.*, depended on special circumstances. In this
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respect, generally, the law of Scotland appeared to run on all fours with the law of England, *Ersk. B. 3. T. 3. S. 81.* In the law of Scotland there were special provisions as to tutors and curators, but no distinction as to annual rests. As to the charge for trouble and commission it was no point in dispute here whether any thing at all ought to be allowed; the only objection was to the amount, and the charge was not unreasonable in its amount. As to the accountants they were properly employed, as they had no Masters in Scotland. Their charge for their services was not unreasonable, and credit was due to their accounts. (*Lord Eldon. (C.)* Were they attended by both parties?) No: but credit was due to their accounts independent of that. As to the charge for making up the titles, the judges below were clear that it ought to be allowed.

In reply it was contended that the Appellants had made an offer to account on a certain principle, which was not accepted, and not having been accepted, it was no waiver of the right to insist on the whole profits made. (*Lord Eldon, (C.)* Then what had the judges to do with it?) Merely to say whether this was not a fair principle. (*Lord Eldon, (C.)* I do not understand this: Wauchope brings in his account; the Lord Ordinary orders you to state any preliminary and general objections you may have to it. You might then say—"We will have " nothing to do with this account, and insist on the " general principle, and all the profits made." But instead of that, you proceeded to take the opinion

of the Court on these four objections, and that opinion being against you, it is, as you say, to go for nothing at all. Suppose in such a case, in the Court of Chancery here, a person offered you terms, and you refused to say whether you accepted them or not, but proceeded to take the opinion of the Court on them, and that being against you, could you then maintain that you were entitled to the larger account, and that the opinion of the Court was to go for nothing? I think you would not be heard in our Courts. But if it be otherwise in the Court of Session, why comes this appeal here? Your argument is, that we ought to send back the case to the Court to proceed as if these objections had never been put in. But if we send it back to them to take the larger account, they may say that they never refused it.)

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Mr. Wetherell and *Mr. A. Murray* for Appellants; *Sir S. Remilly* and *Mr. Leach* for Respondents.

Lord Eldon. (C.) This is a singular proceeding, and one which, according to my notions of legal proceedings, I am as little able clearly to comprehend, as any that ever came before me in the course of my judicial experience.

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Judgment.

The case was originally brought into Court by action of multiple-poiniding, and your Lordships have heard passages read at the bar from the books, from which it appears that the nature of that action in general proceedings is well understood.

Ersk. Mor.
Ed. p. 811.
Lib. 4. T. 3.
S. 23.

The summons states:—"Whereas, it is humbly meant and shown to us by our lovite, Sir William

Summons.

April 8, 1816. “ Augustus Cunynghame, of Livingstone, Baronet:
 “ Sir Archibald Macdonald, Lord Chief Baron of
 “ his Majesty’s Court of Exchequer, in England;
 “ Sir James Montgomery, of Stanhope, Baronet;
 “ William Fullerton, of Fullerton, Esquire; and
 “ John Wauchope, writer to the signet;—that
 “ where the pursuers as trustees under two trust
 “ dispositions and deeds of settlement, executed by
 “ the now deceased Archibald, Earl of Eglinton,
 “ the one dated January 18, 1791, and the other
 “ dated November 5, 1795; and likewise as tutors
 “ appointed by the said Archibald, Earl of Eglinton,
 “ to his daughter, stand vested in, and are
 “ possessed of, certain lands and sums of money
 “ and effects, the extent and amount whereof will
 “ be specified, and condescended upon, in the
 “ course of the action, to follow hereon; that the
 “ pursuers are willing and desirous to account for
 “ their management, intromissions, and transactions,
 “ as trustees, and tutors, and curators, and
 “ to pay over and convey to the person or persons
 “ who may be found to have best right thereto the
 “ sums of money and lands, &c.; but they are
 “ distressed, and threatened to be pursued for the
 “ same, not only at the instance of the Right Hon.
 “ Lady Mary Montgomerie, the only surviving
 “ daughter of the said deceased Archibald, Earl of
 “ Eglinton, and spouse of the Right Hon. Archibald,
 “ Lord Montgomerie, and the said Archibald,
 “ Lord Montgomerie, for his interest, who pretend
 “ to have right to the said lands and other funds in
 “ virtue of the foresaid trust, dispositions, and settlements,
 “ or otherwise; and also by Hugh, now
 “ Earl of Eglinton, Archibald Montgomery, Es-

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"quire, late of Stair, and the pursuers, the saids April 8, 1816.
 "Sir Archibald M'Donald, Sir James Montgo-
 "mery, and John Wauchope, who pretend to have ^{TRUSTEES,}
 "right to the said trust funds and estate, or part ^{TUTORS,}
 "thereof, in virtue of the contract of marriage ^{CURATORS—}
 "entered into between the saids Archibald, Lord ^{HOW TO AC-}
 "Montgomerie, and Lady Mary Montgomerie; ^{COUNT.}
 "therefore the saids, &c. &c. ought, and should
 "be convened before the Lords of our Council and
 "Session, and it ought, and should be found, and
 "declared by decree, &c. that the pursuers are
 "only liable in once and single payment, &c. ; and
 "*that to such of the said defenders or to the pur-*
 "*suers, &c. as shall be found to have best right*
 "*thereto at discussing their preferences, &c. ; and*
 "the pursuers as trustees, and tutors, and curators,
 "appointed by the said Archibald, Earl of Eglin-
 "ton, &c., ought to be decerned and ordained to
 "make payment, &c. to such of the defenders, or
 "others as shall be so found to have best right
 "thereto, and in like manner to denude of and
 "convey to, &c. such of the said defenders, or
 "others, as may be found to have best right there-
 "to, the whole lands, &c. or other funds or effects
 "vested in their persons or in their possession, as
 "trustees, or tutors, or curators foresaid ; and upon
 "the pursuers accounting for their said intromis-
 "sions, and lodging in process a conveyance in
 "favour of the person or persons so preferred, of
 "the lands and others foresaid, they ought and
 "should by decree foresaid, be exonerated and dis-
 "charged of the offices of trustees, and tutors, and
 "curators foresaid, and their whole of management
 "and intromissions in virtue thereof, &c. &c."

April 8, 1816. Stripping this of the technical form, I take the object and meaning to be, that all who had any claims should be called into Court, that the claims should be there stated, and discussed, and decided upon, and that the trustees should be decreed to pay the trust moneys, and to convey the trust lands according as the rights should be established.

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One circumstance is material—that, in the life time of the late Earl of Eglinton, Mr. Wauchope acted as his cashier and agent; and, after the Earl's death, the trustees, who attended their first meeting, November 29, 1796, resolved, "that Mr. Wauchope's powers, as cashier and agent, ought to be renewed, but they delayed giving directions about making out the commissions till their colleagues were advised, and their opinion of the measure known,"—and then they recommended to him, in case his powers should be so renewed, *"to continue to keep his accounts in the same regular manner as before."* All the trustees afterwards agreed that the powers held by Mr. Wauchope from the late Earl should be renewed, and commissions, appointing him cashier and agent, were accordingly made out and executed. Mr. Wauchope himself was one of these trustees, and I am too well aware of the distinction between the law of Scotland and that of England to take upon myself confidently to say that this was an appointment which ought not to have taken place, though I cannot but observe that it is a sort of proceeding at which, in this country, we should look with very great jealousy, when we came to consider that it must be his duty, in his character of trustee, to overlook, check, and control his own management

Respondent appointed cashier and agent by his co-trustees with directions to keep his accounts as before.

Whether such an appointment would be permitted in England, considering the incompatible nature of the duties.

and accounts, as agent and cashier, and there would ^{April 8, 1816.} certainly be a difficulty in permitting a transaction of that sort to take effect here. Such, however, is the fact in the present case.

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In April, 1806, Mr. Wauchope communicated to the then Lord Chief Baron, Macdonald, a state of his intromissions from the time of the late Earl Eglinton's death, to October 1805, and this, according to the paper now before me, appears to have consisted of the following accounts, viz. 1st. Ac- Accounts count, charge, and discharge of Mr. Wauchope's given in by Respondent. intromissions as cashier for the late Earl, from May 21, 1796, to May 21, 1797. 2d. Mr. Wauchope's account as cashier for the trustees, comprising accounts from October 30, 1796, to March 13, 1801, with a continuation from March 13, 1801, to February 16, 1805. 3d. Mr. Wauchope's account as cashier for the tutors and curators of Lady Mary Montgomery, from February 11, 1797, to April 7, 1801, with a continuation from April 7, 1801, to March 31, 1803. 4th. Mr. Wauchope's accounts as cashier for Lord and Lady Montgomerie, from March 31, 1803, to February 16, 1805. These were the accounts delivered on that occasion. When the action came into Court, Mr. Wauchope produced a continuation of his accounts down to February 3, 1807, and the Lord Ordinary ordered the trustees in the mean time to make over to the Appellants securities belonging to the trust estate, to the amount of 20,000/.

It is farther stated in the Appellants' case that the Appellants, by their marriage contract, had become bound to provide a certain sum for the younger children of the marriage, and that the trustees, before

April 8, 1816. they denuded, thought it their duty to have this provision properly secured. This was accordingly done under the sanction of the Lord Ordinary, who, by an interlocutor of the date June 23, 1807, found that the trustees were bound to account for, and denude of the trust fund, and that, upon their so accounting, the Appellants should be bound to discharge them of all their management and intromissions, whether as trustees or as tutors and curators. The Appellants then represented that nothing now remained to be done in order to bring the whole business to a close, except the settling of Mr. Wauchope's accounts, as cashier; and, in obedience to an appointment of the Lord Ordinary, Mr. Wauchope produced a final account of his intromissions, by which it was admitted that there was a balance of 1,981*l.* and a fraction in favour of the trust estate, subject to a charge as for trouble and commission. Of this balance Mr. Wauchope, pursuant to an *interim* decree or order of the Lord Ordinary, paid 1,000*l.* to account, but objected to the payment of the remainder until the accounts should be finally settled, and the Appellants ready to discharge the trustees, and tutors, and curators of their intromissions and management,—which was sufficiently reasonable.

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Final account.

Proposed reference to arbitration, ineffectual.

Then some proposition was made by the Appellants to have the different objections which they had to state to Mr. Wauchope's accounts determined by arbitration, and they proposed a reference to counsel for that purpose. Mr. Wauchope proposed a reference to accountants; but, there being certain points of law to be settled, and it appearing that accountants would not be the most

proper persons to decide, where it was not very clear what the law was, the appellants thought it right that the matter should be settled by persons more particularly conversant with the law, and the proposition having come to nothing, they proceeded with the process, and on January 25, 1811, the Lord Ordinary pronounced this interlocutor, against which, your Lordships will please to observe, there is no appeal. "The Lord Ordinary having heard parties procurators, appoints Lady Montgomerie and her husband to give into process any objections of a preliminary and general nature, which she may have to state to the accounts produced by the pursuers, and upon which it may be wished to obtain the judgment of the Lord Ordinary before entering on an examination of the particular articles of the said accounts and the vouchers thereof."

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Interlocutor of the Lord Ordinary (not appealed from) Jan. 25, 1811; proceeding on the footing of the Respondent's accounts, and appointing any preliminary and general objections to them to be stated before examining particulars.

If that had been a proceeding in the Courts of this country, it is difficult to conceive how it could be supported. The mode here would be to call upon all who considered themselves interested to state their claims; and I think it obvious, that we could not call upon them to state their claims, till the Court had before it some such authentic accounts in a judicial form, as might properly be taken as the recorded statement of such accounts. In this case, however, the accounts mentioned in the Lord Ordinary's interlocutor are accounts drawn up by the accountants Keith and Wilson, for and at the instance of Mr. Wauchope; and the Court, by its final judgment, adopts the whole of these accounts so prepared by Keith and Wilson, although, in drawing up such accounts, they acted, not under a

A Court of Justice in England would hardly proceed on the footing of an account made up under the controul and directions of one of the parties only.

April 8, 1816. reference from the Court, but by the directions, and under the instructions of Wauchope alone. I know that matters of account are often referred by the Court of Session to accountants; they having no Masters to perform the necessary duties of that description, and, no doubt, the Court may, after the cause has been heard, refer matters of this kind to accountants, and then the accounts prepared under such a reference become part of the judicial proceedings in the cause. But it is new to me, and

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It is now in principle to take an account made up by one of the parties as of equal effect as a ground of judicial proceeding, with an account made up under a reference from the Court in the presence and under the check of both parties.

I am sure that it is perfectly new in principle, that a Court of Justice should take an account, made up at the instance, and under the instructions, of an agent, one of the parties in the cause, as an account of equal efficacy and equal judicial effect, as if the matter had been referred by the Court itself to an accountant, taking the account as between both parties, in the presence of both parties, and each having the opportunity of checking the other throughout the whole course of that operation.

The words of the interlocutor, your Lordships will observe, are, "appoints Lady Montgomerie and her husband to give into process *any objections of a preliminary and general nature*, which she may have to state to the accounts produced by the pursuers, and upon which it may be wished to obtain the judgment of the Lord Ordinary *before entering upon an examination of the particular articles of the said accounts and the vouchers thereof.*" Now, suppose this to be in all respects a perfectly regular and proper proceeding, the interlocutor calls for nothing more than *objections of a preliminary and general nature before entering upon an examination of the particulars*

But suppose the interlocutor right, it only calls for general and preliminary objections, re-

and vouchers. Then when these objections of a ^{April 8, 1816.} general and preliminary nature should be given in, and judgment pronounced upon them, it is quite obvious that it would still remain to enter upon an examination of the particular articles of the accounts, and the vouchers thereof. Now the result, as expressed in the last interlocutor of the Court, is,—not that the preliminary and general objections being disposed of, the examination of the particular articles of the accounts and the vouchers thereof ought to be entered upon ; but that the whole of the accounts prepared by the accountants Keith and Wilson were throughout right and proper in every particular, without any examination at all ! If the commencement startles one a little, the conclusion is, to me at least, absolutely unintelligible.

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serving the
consideration
of particulars.
The conclu-
sion was that
the accounts
were approved
without exa-
mination of
particulars.

Then four preliminary objections were stated, and on these preliminary objections the Lord Ordinary and the Court of Session pronounced several interlocutors ; one of which is wholly, and some are partly, appealed from. But the result is that the accounts, prepared by the accountants Keith and Wilson, are right upon the whole matter without any examination of particulars.

Objections
stated to the
accounts pur-
suant to Lord
Ordinary's in-
terlocutor.

Thus then we have the judgment of the Court below upon the points of law arising out of these four preliminary objections. But now we are told that all this is to go for nothing ; and so told to my no small astonishment ; for it is saying neither more nor less than this ; “ If you, the Judges of the Court of Session, should be for us upon these points, all is well ; but if not, then your opinion goes for nothing at all.” This may be consistent with their practice, but it bears no analogy to any

Argument of
the Appellants
that the pro-
ceedings and
judgment of
the Court
ought to go for
nothing, and
that as the
judgment on
the ground
which they
first took is
against, they
have a right to
commence

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again on a
new ground.

thing I know. The proposition is, "if your opinion
" is not in our favour, then your opinion must go
" for nothing, and we shall be at liberty to open up
" the whole matter *ab initio*, and you shall hear the
" cause over again, as if the Lord Ordinary had
" never called upon us for these objections, and we
" had never given them in." But, if that be con-
sistent with their practice, why comes this appeal
here? For, if they have a right to say to the Court
of Session: "Your opinion being against us, is to
" go for nothing at all," why bring the cause before
us? We cannot act on that principle, and give them
an opinion which, if against them, is to go for
nothing. And I do not know very well how to
deal with the cause in that view of it, unless we
were to dismiss the proceedings altogether, and
allow them to begin again. But lest we should risk
too much in doing that, I shall state these objec-
tions.

Objections.

First then, they say that it was the duty of the
Respondent, as cashier and manager for the trust-
tees, and tutors, and curators, to have rendered his
account annually, in order that the large balances in
his hands might have been ascertained; and that
the interest against him might have been annually
calculated; and then they state that his account, as
cashier for the trustees, is balanced only twice in
nine years, and his account as cashier for the tutors
and curators only thrice in the same period.—2d.
they say that the cashier, instead of stocking out
the savings of the estate (by stocking out they mean
putting out at interest) had kept in his hands
immense balances, for which there was no occasion
in the ordinary administration of the estate, and of

the actual employment of which he refused to give any account; and then they state that upon these balances, which were very great, he had allowed the appellants interest only at the rate of $3\frac{1}{4}$ per cent. while, as they contended, he was bound to account

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to them either for the profits actually made of their money (there they speak of the profits actually made); or at least for the legal rate of interest.—3d, The Appellants objected to the amount of the charges made by the Respondent, for his trouble in managing these affairs, and they stated that they were willing to allow a fair, and even liberal gratification for his trouble; but they thought the Respondent asked a great deal too much (not objecting therefore to pay him something for his trouble, and not bringing into dispute how a demand for any allowance at all for trouble could be supported by a trustee converting himself into an agent for managing the trust property, and requiring to be paid as an agent for his trouble) but objecting only to the amount of the demand, and insisting that it ought to be less than it was. Before the cause can be

A. 26, Infor-
mation for
Appellants.

Whether a trustee, appointed by his co-trustees agent and manager of the trust fund, can support a claim to an allowance for his services as agent.

finally decided that will be a question to be considered; and, if the matter be open to him on the *quantum meruit*, then it will be for him to prove that he deserved more than they are willing to allow; and if the question depends upon the contract, it will be to be considered what is the meaning of his being continued in the situation of cashier and agent to act in that situation, as he did in the late Earl's life time. And, without presuming at present to say what, according to the Scotch law, ought to be the construction of such a contract, I may say that the Courts here would consider the

April 8, 1816. meaning to be that he should act for the same reward, as in the late Earl's life time. But I do not presume to say what the Scotch law may be on this head, as I see doctrines laid down not at all reconcileable with the law, which I am in the habit of administering. The Appellants also objected to a charge of 420*l.*, stated to have been paid to Messrs. Keith and Wilson, for making up the first set of accounts, because had the Respondent kept the accounts of this estate separately from his other concerns, and rendered and balanced them annually, as it was his duty to have done, and which had been his practice, while acting under the late Lord Eglington, the assistance of professional accountants would have been unnecessary; and then they objected, 4thly, to payment of Mr. Wauchope's account of the expense of making up titles to certain parcels of land, on the ground that these titles were improperly completed. As to this last point, I do say that there would be no doubt here that, if

A trustee acting *bond fide* in the trust is not to suffer for mistake, unless there has been very gross ignorance and mis-carriage.

a trustee proceeds *bond fide*, unless there be *crassa ignorantia*—unless he has grossly miscarried, he is not to suffer, by having the expense thrown upon himself, for whatever error he may fall into, acting under advice, or from the general notions of law prevalent at the time. But it is difficult to decide this question at present.

Question as to the trustees accounting for all the profits made by him of the trust fund.

Then, as to the 2d objection—I do not mean to say, but that some words may be found *sparsim* in these formal papers, which may open the question whether a trustee is bound to account for all the profits which he has actually made of the trust fund, if pushed to the full extent which the terms would bear. But, although the argument chiefly

insisted upon at the bar here for the Appellants was April 8, 1816.

that the trustee was bound to account for all the profits, which he actually made of the trust money, the argument below turned upon the rate of interest with which he ought to be charged. In looking

TRUSTEES,
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at the doctrines stated in the books, I find very great difficulty in collecting what the Scotch law is upon this point, and I think we should be running a great deal too fast to venture to decide the question in this state of the proceedings. In England there

would be no difficulty. Here a trustee can make no profits for himself of the trust money—and, if he offered to pay a certain rate of interest, the *cestuique* *trust* might say; “No. You must account to me

By the law of England, a trustee can make no profits for himself of the trust.

“for all the profits you have made of my money,

“and I have a right to know from you what profits

“you have actually made of it, and, if you have

“made 10 per cent., I am entitled to it. If the

“use you made of it was to make any particular

“rate of interest, then you must pay me that inter-

“est. If you have mixed my money with your

“own, so that you cannot distinguish what is

“yours, and what is mine, and cannot tell what

“profit you have made of my money, less than the

“legal interest, you shall pay me interest at 5 per

“cent.” But, when we come to these doctrines

about stocking out, and when it ought to be done,

and when interest ought to commence, according to

the law of Scotland, I feel a difficulty. And yet it

may be well worth while to consider whether, when a

trustee has made use of the trust money for his own

benefit, these doctrines apply to the question as to

profits actually made, and whether on that point the

Whether the rule of law as to profits actually made by a trustee, out of the trust fund, is not the same in

April 8, 1816. rule of law is not the same as that of the law of
 England.

TRUSTEES,
 TUTORS,
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Scotland, as in
 England.

Interlocutor
 of the Lord
 Ordinary, of
 12th Novem-
 ber, 1811, in
 part appealed
 from.

Then the Lord Ordinary pronounced this inter-
 locutor: " Having considered the accounts given in
 " by Mr. Wauchope, with the objections thereto for
 " Lord and Lady Montgomerie, answers, replies,
 " and duplies, and writings produced, and whole
 " process, *finds* that, though from various circum-
 " stances stated in the answers, it may have been
 " difficult for Mr. Wauchope to make up a complete
 " balance at the end of every year, yet the actual
 " balance at the end of every year may still be
 " ascertained, and that each balance, when ascer-
 " tained, will be the sum on which the interest
 " ought to be charged.—2d, Considering the rules
 " laid down in law for the employment of the
 " money of minors, by their tutors and curators, on
 " the one hand, and the eventual demands for sums
 " of money which might be made, though not to
 " the extent of the balances now in question, on
 " the other, *finds* that interest ought to be charged
 " at the rate of 4 per cent., instead of $3\frac{1}{2}$ per cent.
 " as stated in the accounts; *finds* nothing so ex-
 " plicitly stated on the part of the objectors, as
 " should induce the Lord Ordinary to reduce the
 " allowances for trouble below the rate which was
 " fixed by Messrs. Keith and Wilson; *finds* that in
 " accounts of such magnitude, it was proper and
 " necessary to take the assistance of professional
 " accountants—repels the third objection accord-
 " ingly. On the *fourth* objection, *finds* it at least
 " doubtful, whether a general charge and decree
 " of constitution were necessary in deducing ad-

“judication in implement; repels this objection, April 8, 1816.
“&c.”

As it is my intention to propose that this cause should be remitted for review, I shall say nothing as to the necessity of having recourse to the assistance of professional accountants in the present case, and as to certain propositions, as if trustees were at liberty to act so as never to keep regular accounts themselves—except this, that I think that to be a matter well worth re-consideration; as I apprehend that a trustee, and especially if he be also an agent, ought to keep his accounts at least so regularly, as to enable the Court, upon inspection of these accounts, to judge whether in that case it is necessary to employ professional accountants.

TRUSTEES,
TUTORS,
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HOW TO AC-
COUNT.

Whether a trustee is not bound to keep accounts of the trust fund, at least so regularly, as to enable the Court to judge whether it is necessary in the particular case to have recourse to professional accountants.

Both parties were out of humour with this interlocutor, and represented against it; but the Lord Ordinary saw no ground to alter it in any respect. He, however, makes *avizandum* with the cause to the Lords of the first division, and on July 2, 1812, the Court pronounced the following interlocutor, which is partly appealed from:—“Upon report of Lord Hermand, and having advised informations for the parties, the Lords *find* that Mr. Wauchope’s accounts must still be brought to an annual balance.”—I would just say, that I cannot conceive how it ever entered into any person’s head that they ought not.—“And that, in striking such balance, the allowances to Mr. Wauchope for commission, trouble, and correspondence, as cashier and agent, under the trust and for the tutors and curators, and for Lord and Lady Montgomerie, are to be placed to his credit.”—So that it states, not merely that an allowance for commission, trou-

Interlocutor of Court, 2d July, 1812, partly appealed from.

The accounts ought to be annually balanced.

April 8, 1816.

TRUSTEES,
TUTORS,
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HOW TO AC-
COUNT.

ble, &c. is to be made to Mr. Wauchope, but that this particular allowance is to be made to him,—which deserves reconsideration ;—“ find that upon the said “ annual balance Mr. Wauchope is chargeable with “ interest, at the rate of 5 per cent. after allowance “ of a year for stocking out the same, so far as con- “ sisting of rents payable in vietual; and of six “ months, so far as consisting of rents payable in “ money; and of the like period of six months, so “ far as consisting of other payments of money.”— On looking at the doctrines in the books, your Lord- ships will there find an explanation of that part of the interlocutor ;—and *find* that Mr. Wauchope is “ not chargeable with interest on his receipts *de die “ in diem*, or until the expiration of the said periods.” —This goes by the question as to all the profits, which was not the great point argued below, though it was the point chiefly insisted upon here.—“ Repels “ the objections to the allowances proposed by “ Messrs. Keith and Wilson for Mr. Wauchope, as “ agent and cashier aforesaid,—as also repels the ob- “ jection to the proposed allowance to Messrs. Keith “ and Wilson for auditing the accounts ;—and fur- “ ther repels the objection to the charge for the ex- “ pense of the adjudications in implement, relative “ to the lands of Bogside, Dreghorn, Duggan, and “ others.—And *remit* to Mr. Claud Russel, ac- “ countant, to prepare a report of the state of ac- “ counts between the parties, and remit to the Lord “ Ordinary to receive such report when prepared, “ and to do further thereon as he shall see just.”

This, therefore, contains the opinion of the Court on those four preliminary objections, which the Ap- pellants gave in under the appointment of the Lord

Ordinary, who had called upon them to state any objections of a preliminary and general nature which they might have to state to Mr. Wauchope's accounts, and upon which they might wish for the Lord Ordinary's opinion, before entering upon an examination of the particulars.—And the Court then remits to an accountant to prepare a report of the state of accounts between the parties; thereby making the accountant an officer of its own.

April 8, 1816.

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TUTORS,
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HOW TO AC-
COUNT.

Both parties petitioned against this interlocutor; —Mr. Wauchope, though he would have been contented with it, if the other party had been contented, petitioning *pro forma*, so as to have the whole matter open, and their way of shutting up the business, is this:—"They refuse the prayer of the petition for Lord and Lady Montgomerie, and on the petition of Mr. Wauchope they alter their former interlocutor, and repel the whole objections to the report of Messrs. Keith and Wilson, and approve of the said report in the whole heads and articles of the same, &c."—Thereby putting an entire extinguisher on the Lord Ordinary's reservation as to the examination of the particular articles of the accounts and the vouchers thereof; so that the result is, that there shall be no examination at all of the particular articles and vouchers; a result, which appears no less singular to an English lawyer than the principle contended for in behalf of the Appellants. They (the Appellants) acceded to the proposition of the Lord Ordinary to give in preliminary objections to Mr. Wauchope's accounts, upon which they might wish to have the Lord Ordinary's opinion. They accordingly gave in preliminary objections, and on these they have the Lord Ordinary's opinion. They

Interlocutor
2d Feb. 1813,
(appealed
from), approv-
ing Wau-
chope's ac-
counts, and
putting an ex-
tinguisher on
the Lord Or-
dinary's reser-
vation as to
the examina-
tion of parti-
culars.

April 8, 1816. then go to the Court, and take the opinion of the Court of Session on their objections, and the principle now contended for at the bar here is this, that, if they are not satisfied with the opinion of the Court, they are entitled to turn round, and say, very civilly and respectfully, "If these are your opinions, we don't like them, and have a right to begin again, as if we had never acceded to the Lord Ordinary's proposition to give in these objections." It is not less singular, however, that this should be considered as a proper mode of settling accounts:—Wauchope, one of the parties, bringing his accounts into Court, prepared by accountants, as intelligent, if you please, as any that ever existed in that profession, but not acting under a reference from the Court, prepared in an *ex parte* way, not checked by any principles of law laid down by the Court, and not checked by all those who had an interest in the subject; and the Court approving of these accounts, so prepared, and brought in, in the whole heads and articles thereof, without any further examination! But it ends where it begins,—"Here are Mr. Wauchope's accounts, we are satisfied, without any examination of particulars, that they are all right, and you, the other parties, shall know no more about the matter." How to support that interlocutor I cannot tell.

TRUSTEES,
TUTORS,
CURATORS—
HOW TO AC-
COUNT.

With respect to the other interlocutors; the Lord Ordinary's interlocutor appointing the Appellants to give in objections is not appealed from, and some are partly appealed from, and some not at all. But seeing what is so strenuously asserted in regard to the principles of the law of Scotland as applying to questions of this description, I should be sorry

to deal more strongly with these interlocutors than ^{April 8, 1816.} to submit them to the Court below for review. If ^{TRUSTEES, TUTORS, CURATORS—HOW TO AC-COUNT.} it be open to the Appellants to insist upon knowing what profits Mr. Wauchope actually made of their money, and upon payment to them of all these profits; and if that be the law of Scotland as contradistinguished from the question of interest, they will have an opportunity of submitting that claim to the Court. And I think it of great importance to minors, tutors, curators, and trustees, not merely with reference to the interest of the parties, but also on account of the difficulties connected with the subject, that the whole matter should be thoroughly investigated, and the law distinctly and finally settled. ^{Important to have the law on the subject distinctly and finally settled.}

As to the case of *Raphael v. Boehm*, it does not ^{11 Ves. 92.} apply. In that case the executors as trustees were bound by the very words of the trust reposed in them, by the very words of the instrument which created the trust, to accumulate the trust fund, by laying out the interest of it from time to time to form capital.

I propose to your Lordships to reverse the last interlocutor, and to send back the rest for review, so far as they are complained of. And in a case of so much importance, I think we ought to avail ourselves of the clause in the act of parliament, inserted with that view by which we are authorised to require that the division, to which the cause is remitted, shall take the opinion of the other division, that we may know what the accumulated wisdom of the Court of Session will produce on this important subject.

Last interlocutor *reversed*, and the others remitted for review, so far as complained of.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

YOUNG and Co.—*Appellants.*LEVEN—*Respondent.*

March 27, 28, 1816. WHERE a public officer of excise, &c. suffers the duties to be in arrear and exacts interest on the arrear from the private party, the interest belongs to the officer or to the public;

INTEREST OF
PUBLIC MONEY.

and the question is between them; and the private party has no reason to complain, and cannot recover the interest back again.

The Lord Chancellor observing that where a decision is clearly right, the House of Lords will not remit, merely because the ground of decision below has been different from the ground of its own decision.

Action, 1810. **I**N June, 1810, the Appellants (Distillers) brought an action against the Respondent, who had been a collector of excise, concluding for repayment to them of two sums of money with which, as they alleged, they had been overcharged by him for duties of excise; and also for repayment of a sum of 500*l.* more or less, for interest charged against them upon arrears of duties.

Interest on
arrears of
duties.

The last is the point for which the cause is here noticed. It was contended for the pursuers in the action that the charge of interest on arrears of duty was illegal, and the Scotch acts—1693, c. 3.—1695, c. 29.—and 1696. c. 2.—and the British statute, 1 Wm. and Mary, sess. 1. c. 24. were referred to. On the other hand it was contended, that till 1807 (prior to which time the transactions

in question took place) it had been the practice of the collectors in Scotland to receive interest for themselves upon balances of public money allowed to remain in their hands; and that this was universally understood to constitute their chief source of emolument, as their salary was altogether inadequate; that it had been thought expedient at one period to allow the duties to remain in arrear, but that the distillers were bound to pay interest on these arrears, and that as the loss from the duties being in arrear fell on the collectors, they had been authorised by general letter, 1797, of the Board of Excise to take the interest, and that it had been the general practice to do so; and at any rate the private party had no right to demand it back again.

March 27, 28,
1816.
INTEREST OF
PUBLIC MONEY.

The proceedings in an investigation into the conduct of the defender by order of the treasury, upon a charge against him by the pursuers, were referred to, though they had nothing to do with the cause. The result was that the defender was dismissed from his office, but all the Judges below concurred in the opinion that the Lords of the Treasury had been misled.

The Court sustained the defences, assoilzied the defender and decerned, and from this judgment the pursuers appealed.

December 4,
1812.
January 12,
1813.

Lord Eldon (C.) This action was raised upon a summons which states that the Respondent, *Leven*, received from the Appellants the sums of 400*l.* and 823*l.* upon the pretence that these moneys were due by them for duties to the Excise, and would be placed to their credit in *Mr. Leven's* accounts as collector; but which moneys were nei-

March 28,
1816.
Judgment.

March 28,
1816.

INTEREST OF
PUBLIC MO-
NEY.

Interest.

ther due to the Excise nor placed to the credit of the Appellants. The summons likewise states that the Respondent had exacted from the Appellants various sums amounting to 500*l.* more or less, in name of interest, contrary to law ; and it concludes for repetition of these sums 400*l.*, 823*l.*, and 500*l.* more or less as it is expressed.

November 12,
1811.

The Lord Ordinary pronounced the following interlocutor : " Having considered, &c. *finds*, that " no regard can be paid in this action, to the proceedings alleged to have taken place before the " Lords of the Treasury, or Board of Excise : " and then he states the reason why no regard can be paid to them. " Seeing these proceedings have not " been produced in process, and as little to the " report of Messrs. Bonar and Grant for a similar " reason." I should here state that the Appellants had prayed in aid these proceedings and this report, upon which I have nothing to observe, except that they have been the subject of much argument and statement on both sides, though if produced the Court could have taken no notice of them whatever. " *Finds* that the oath said to be emitted by the " pursuer, William Young, in the course of these " proceedings, cannot be received in evidence " against the defender in the present question, while " the other parts of the proof, of which only an " authenticated copy is produced, going in a great " measure to an alleged interference of the defender in a Burgh election, whatever effect it might " have with the Revenue Board, can have none in " this cause." It appears to me that this finding is altogether unnecessary, as the proof, though it had been produced, could clearly have been no

ground for any proceeding in a Court of Justice. ^{March 28, 1816.}
 “ *Finds* that the general letter of 1st May, 1797, ^{INTEREST OF PUBLIC MONEY.}
 “ addressed by the Board of Excise to the collec-
 “ tors, implies that at that period they were entitled
 “ to charge interest on arrears, and that the receipt
 “ of interest was not prohibited till the year 1807,
 “ after the date of the transactions now in ques-
 “ tion.” On this finding I have to observe that
 there was a good deal of argument as to the mean-
 ing of this letter, of 1st May, 1797. But it does ^{Letter. 1797.}
 not appear to me that such a letter can affect the
 question, as a question of law. If the Board gave
 directions agreeable to law, they would be sustained
 as law; and if not agreeable to law, they could not
 be legal merely because they were the directions of
 the Board. “ *Finds*, that the alleged over-payments
 “ of 400*l.* and 823*l.* 10*s.* are not made out by the
 “ statement in the condescendence, and disproved
 “ by the comparison of the various receipts in the
 “ answers. Sustains the defences, &c.”

As to the last finding it has not been alleged here
 on the part of the Appellants that they have a case,
 which calls upon us to reverse the judgment in as
 far as it finds that they have not been overcharged
 in the sums of 400*l.* and 823*l.* But it has been
 argued that the Court below ought to have em-
 ployed an accountant of excise to ascertain whether
 they had or not been so over charged. As to that,
 on the most attentive consideration which I have
 been able to give the case, it appears to me that this
 part of the interlocutor is right, and that the Appel-
 lants have not been double charged in these sums.
 And if such be your Lordship's opinion, you would
 feel great reluctance in sending the case with orders

March 28, 1816. to the Court below to send the matter to an accountant.

**INTEREST OF
PUBLIC MONEY.**

Interest for
duties in ar-
rear.

That is a ques-
tion between
the officer and
the public.

Then it has been insisted, that the Appellants are entitled to a return of interest charged for duties in arrear; and to make out that claim they allege that, whatever might be the case with respect to the public money when received, the collector ought not to receive interest from the private party for duties in arrear. With regard to that, if a public accountant has public money in his hands, and employs it so as to make interest of it before it is called for, the interest made in that intermediate time, belongs either to himself, or to the public. Whether it was his own in this instance, or belonged to the public, I give no opinion. But it must belong to him or to the public. There is a difference here however, for this is not a case where the collector made interest of money actually received before it was called for on behalf of the public, but a case where the money was not paid by the party, and the officer charged interest on the arrears. In one view, that case is not substantially different from the other. But as far as respects the policy of the law there may be a very wide difference between the officer receiving the money and deriving interest from it, leaving open the question whether it belongs to himself or to the public, and his suffering it to remain in the hands of the party, he (the officer) receiving interest upon the arrear. But still the trader cannot keep it, for it belongs to the public or to the officer. Suppose an information were filed and it proceeded for interest, it would not be necessary to proceed against the trader. It would be enough to charge the collector as if he had re-

ceived the money and made interest of it. Then if ^{March 28, 1816.} the interest did not belong to Leven it was the property of the public; and if the duties were not paid at the time they were payable and interest was charged, whether that interest belonged to the officer or to the public as issuing from the *corpus* of that fund which belonged to the public, the trader had no reason to complain. And as to exaction within the acts here mentioned, the claim upon that ground, I think, cannot be at all maintained. I therefore still think that the party has no right to recover. But as to the question, whether the interest belongs to the officer or the public, I avoid giving any opinion.

Then it was said that this was not the ground upon which the Court below decided. But I apprehend it is not our duty, merely for that reason, to send a case back again to the Court below; where it is perfectly clear that if the Court below were to decide differently, the judgment must here be reversed.

Then the best mode of proceeding, as it appears to me, will be, not adopting the *reason* in the Lord Ordinary's judgment, to affirm it as far as it sustains the defences, assoilzies the defender, and decerns, and then to affirm the other interlocutors. This seems to me, likewise, a case in which 50*l*. costs may be properly given.

Lord Redesdale. As to the question whether Leven had improperly overcharged the Appellants, it is manifest on the evidence that he did not; for the only reason given for that allegation is founded on the receipts, and in looking at these, it appears

INTEREST OF
PUBLIC
MONEY.

Where it is clear that the decision is right, the House of Lords will not remit merely because the Court below decided on a different ground from that upon which the Lords decide.

March 28,
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MONEY.
Interest.

almost impossible that overcharges could have been made, unknown to Young; and so far I am clearly of opinion that the judgment is right.

As to the interest, that is a very serious question in one view. But it is clear the Appellants have no right to recover it back again. The duty of the officer is to call for payment as the money becomes due, and at stated times to remit it to the proper hands. But Leven takes sums as interest of arrears of money not paid, when it ought to be paid. The effect of this, if made out, would be that he would be chargeable with, and responsible for, both the gross sum and the interest. But the trader has no right to complain of the indulgence which he has received, however improper; and I concur likewise in the opinion which has been given as to that point. I agree also that the reason alleged for sending back the case is not sufficient, and that the Lord Ordinary's interlocutor ought to be affirmed, so far as it sustains the defences, assquizes the defender, and decerns; and that the other interlocutors ought to be affirmed. As to the costs, I should be inclined to concur if a larger sum had been mentioned.

Lord Eldon (C.) Then let it be 70*l.*

Appeal dismissed and judgment (with alterations as above) *affirmed*, with 70*l.* costs.

Agent for Appellant, CAMPBELL.

Agent for Respondent, SPOTTISWOODE and ROBERTSON.

IRELAND.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

JONES, *d.* JOSEPH HENRY—*Plt. in Error.*

WILLIAM HANCOCK, and ANN } *Defts. in Error.*
 his Wife, and others }

AND

LONG, *d.* JOHN JOSEPH HENRY—*Plt. in Error.*

WILLIAM HANCOCK, and ANN } *Defts. in Error.*
 his wife, &c. }

TESTATOR devises his estates to his eldest daughter A. for life, remainder to her first and other sons in tail male—
 remainder to his daughter F. for life, remainder to her first and other sons in tail male—remainder to the first and every daughter of A., and then annexes this proviso or condition.

May 1, 5, 10,
1815.
June 12, 19,
1816.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

“ But I give, devise, and bequeath all my said estates, above-mentioned, to my eldest daughter A. on this proviso, and express condition, that she marry a man really and *bonâ fide* possessed of a property at least equal to, if not greater than the one I leave her—and if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries, and all the remainder of my property shall immediately pass over, and be given up to my second daughter F., to whom in that case I bequeath it.”

Held by the House of Lords, concurring in the unanimous opinion of the Judges, that the devise over was void for the uncertainty—the specific portion or share so given over not appearing on the face of, or from the instrument itself.

JOHN Henry, Esq., being seized in fee of an estate in the County of Galway, of considerable

May 4, 1786.
Will of John
Henry.

May 1, 5, 10,
1815.
June 12, 19,
1816.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

value, on the 4th day of May in the year 1786 duly made and published his last will and testament, in writing, in the presence of three credible witnesses, who attested the same, which, so far as is material to the present case, was as follows: "I give and bequeath unto Hugh Henry, Esq. my brother, for civilities shown me, the sum of 200*l.* sterling, besides 500*l.* and the reversion hereinafter mentioned for the trouble he will have in the executorship to which I appoint him. I bequeath unto Mrs. Ann Magan my sister, for civilities shown me, the sum of 200*l.* sterling; and I bequeath unto Daniel M'Gusty of Ship Street, Esq. the sum of 50*l.* sterling, and chargeable with said legacies. I give, devise, and bequeath all my estates in the Kingdom of Ireland to my eldest daughter, Ann Henry, begotten by me on the body of Susannah Egar, the said Ann being born on the 23d of September, 1783, for and during her natural life; and after her death I bequeath the said estates to her first and every other son in tail male, the elder to take before the younger; and in default of such issue male, I give and bequeath all my said estates above mentioned to my second daughter Frances Henry, begotten by me on the body of the said Susannah Egar aforesaid, the said Frances being born on the 6th of December, 1785, for her natural life; and after her death, I bequeath my said estates to her first and every son in tail male, the elder to take before the younger; and in failure of such issue male, I bequeath all my said estates to the first and every daughter of my eldest daughter Ann Henry above mentioned,

" the elder to take before the younger ; and in failure
 " of such issue, I bequeath all my said estates to
 " the first and every daughter of my second daugh-
 " ter Frances Henry above mentioned, the elder to
 " take before the younger.

May 1, 5, 10,
 1815.
 June 12, 19,
 1816.

DEVISE VOID
 FOR UNCER-
 TAINTY, &c.

Proviso on
 which the
 question arose.

" *But I give, devise, and bequeath all my said*
 " *estates above mentioned to my eldest daughter Ann*
 " *Henry aforesaid, on this proviso and express con-*
 " *dition, that she marries a man really and bona*
 " *fide possessed of a property at least equal, if not*
 " *greater, than the one I leave her ; and if she mar-*
 " *ries a man with less property than that, in that*
 " *case I leave her only as much of mine as shall be*
 " *equal to the property of the man she marries,*
 " *and all the remainder of my property shall imme-*
 " *diately pass over and be given up to my second*
 " *daughter, Frances Henry, to whom in that case I*
 " *bequeath it.*

" And it shall also be necessary for the man my
 " eldest daughter Ann marries, in order to be entitled
 " to the aforesaid property, to take the name and
 " arms of Henry, unless he be a Lord, or possessed
 " of property of more than double the value of mine.

" I devise and bequeath to my second daughter,
 " Frances aforesaid, an annuity of 300*l.* sterling,
 " chargeable out of all my estates, to be paid her
 " every year out of my said estates, in two equal
 " and even payments to her and her issue ; in failure
 " of such issue, at her death said annuity shall
 " revert back again and return to my eldest daughter,
 " Ann Henry and her issue. All I have said in
 " regard to my eldest daughter and her marriage as
 " above mentioned, I mean and intend shall stand

May 1, 5, 10, 1815. " good in regard also of my second daughter Fran-

June 12, 19, 1816. " ces Henry, in case by the death of her eldest

" sister Ann she shall before she marries come to

DEVISE VOID " be possessed of my estates as aforesaid, and also

FOR UNCERTAIN- " the rents, issues, and profits of all my aforesaid

TAINTY, &c. " estates, except such parts as shall be necessary

" for a genteel maintenance and education of my

" two daughters above mentioned, shall be put out

" at interest till a proper sum be collected for a

" purchase, and advantageous opportunity of pur-

" chasing land with it shall be found, which land

" shall be added to my other estates, to the use

" of my eldest daughter Ann Henry, which pur-

" chased estates shall be considered as a property I

" leave her, in regard to the marriage she shall

" make as before mentioned.

" And I will and devise, that in case my two

" daughters die without issue, that my estates shall

" then go to my brother Hugh Henry, Esq. whom I

" nominate and appoint as guardian to my children

" and executor of my will."

Frances Henry died in testa- After the making of the said will, the said Fran-
tor's lifetime. ces Henry, one of the devisees therein named, died

on the 1st day of May, 1789, in the lifetime of the

said testator; and the said John Henry died on the

Testator died 17th day of September, 1790, without having altered
September 17, or revoked the said will, and without leaving any
1790. lawful issue; but leaving two brothers, namely,

Joseph Henry his heir, and Hugh Henry his second

brother, and the said Defendant Ann, his illegiti-

mate daughter.

Testator's el- The said Joseph Henry, the testator's eldest
dest brother brother, died on the 7th. day of November, 1796,

leaving John Joseph Henry his eldest son and heir at law, who is also heir at law of the testator.

May 1, 5, 10,
1815.

June 12, 19,
1816.

Hugh Henry, the younger brother of the testator, died on the 10th February, 1802, leaving Joseph Henry his eldest son and heir at law.

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died Novem-

ber 7, 1796.

Testator's
younger bro-
ther died Feb.
10, 1802.

The said Ann Henry, after the death of the said John Henry, entered into the possession of the said estates, and was thereof seized under and by virtue of the said will, and being so seized on the 4th day of April, in the year 1803, intermarried with the Defendant William Handcock, at which time the said Ann was of the age of nineteen years and six months.

Ann Henry
seized of the
devise estates,
and married
Defendant
Handcock,
April 4, 1803.

At the time of the marriage of the said Ann Henry, with the said William Handcock, he was possessed of a personal property of the value of 6,400*l.* sterling in the whole, and of no other property.

With respect to the value of testator's estates, and the comparative value of Mr. Handcock's property, the special verdict hereinafter mentioned finds as follows, namely, that the estates devised by the testator were, at the time of the said marriage, of the yearly value of 1638*l.* 19*s.* 4*d.* and the fee simple of the said lands was of the gross value of 38,856*l.*

Value of tes-
tator's estates,
as found by
the verdicts.

That an estate in the whole of the said lands for life of the said Ann Henry, was of the value of 12,052*l.* sterling, at the time of the marriage, and that an estate in one-sixth part of the fee simple of the said lands was equal in value to the whole of the property of the said William Handcock, at the time of the said marriage, and an estate for the life

May 1, 5, 10, of the said Ann Henry, in one-half of the said lands, was equal in value, at the time of the said marriage, to the whole of the said property of the said William.

DEVISE VOID
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TAINTY, &c.
Easter term
1807. Eject-
ment brought
by Plaintiff in
error.

Upon the said marriage taking effect, on the 4th day of April, in the year 1803, the said John Joseph Henry, the heir of the said Joseph and of the said testator, as of Easter term 1807, brought his ejectment upon the title, in the Court of King's Bench, for the recovery of all the estate of the said John Henry; to which ejectment defence was taken in the name of the said William Handcock, Ann his wife, the Honourable Robert Day, John Pratt, and John Sealy Townsend, Esquires, and the cause came on to be tried at the summer assize 1807, when the Jury, under the direction of the Judge, found a special verdict, submitting the law arising from the facts to the judgment of the Court of King's Bench, in which cause, upon the argument of the special verdict, judgment was given as of Hilary term 1809, for the Plaintiff; from which judgment a writ of error was brought by the Defendants to the Court of Exchequer Chamber, upon which, after the cause had been argued at great length, the judgment was reversed. The Plaintiffs then brought their writ of error in the House of Lords.

Special ver-
dict.

Judgment for
Plaintiff in the
King's Bench.

Reversed in
the Exchequer
Chamber.

FIRST CAUSE.

Case of the
ultimate de-
visec.

Mr. Holroyd (now Justice Holroyd, for Plaintiff in Error, Lessee of Heir of Hugh Henry). Con- sider what would be the effect of the will if the

testator had died immediately after making it, or if ^{May 1, 5, 10,} things had been in the same state at the time of ^{1815.} his death, as they were at the time of making his ^{June 12, 19,} will. In *Doe v. Underwood*, Willes, 293. it was ^{1816.} held that this was one of the rules for ascertaining the intention of a testator, and the effect of a will. ^{DEVISE VOID FOR UNCERTAINTY, &c.} In the first place then, the intent is to prevail, unless it be contrary to the rules of law; and next, in endeavouring to ascertain the intent, we are to consider how things stood at the time when the will was made. Then how would matters stand if there had been no proviso? Ann would have a life estate with remainder to her first and other sons successively, in tail male; remainder to Frances for life, with remainders to her first and other sons successively, in tail male; remainder to the first and every other daughter of Ann, without limitation; so that they would take an estate for life, or, in consequence of some future words, an estate tail, it is not material which; but there would be a vested remainder in Hugh Henry in fee. What then has the testator done? He has devised the whole away. No part is vested in the heir at law, but the whole, from first to last, is given away from him. Then, suppose the estate for life ends by nature, or by the surrender of tenant for life to the remainder man in fee, the latter becomes immediately entitled, and the heir cannot step in here; nor, if it ends by forfeiture, as the whole fee is parted among them, does the heir at law step in during the residue of the estate of tenant for life. So it is in the case of the issue. Suppose it to be given on the death of the heirs male, and there are no heirs male, yet, in-

May 1, 5, 10,
1815.
June 12, 19,
1816.

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FOR UNCER-
TAINTY, &c.

asmuch as the whole fee is divided among them, the heir does not step in, but the remainder man. Now, what difference does the death of Frances in the life-time of the testator make? Every devise to her is lapsed, and to her children, as she died unmarried. Then the estates would go to Hugh on failure of issue of Ann. It may be said, that she takes an estate tail by implication. But, speaking of it without the condition; whether Ann took an estate for life, or in tail, still the fee is parted among them. The whole fee is given to the devisees; and, where there are no objects to take by the intermediate devise, the next remainder man takes, and here takes the whole fee. As to the question of entry or claim, there could be none on the death of Frances in the testator's life-time, and none since, as Ann is alive. Then what is the effect of the provision in restraint of marriage. This is not a general restraint of marriage; and a partial restraint is legal, *Perryn v. Lyon*, 9 East. 170. And in the Court of Chancery, lately, a case was decided on the same ground. The proviso is—"But I give, devise, and bequeath, all my said estates above-mentioned, to my eldest daughter, Ann Henry, aforesaid," (this goes to whatever is given by the will, whether she took an estate for life or in tail, it is *all my estates*), "on this proviso and express consideration only, that she marry a man, who is really and *bonâ fide* possessed of a property at least equal, if not greater, than the one I leave her. And if she marries a man with less property than that, I, in that case, leave her only as much of mine, as shall be equal

Perryn v.
Lyon, 9 East.
170.

"to the property of the man she marries : and all
 "the remainder" (this is material) "of my pro-
 "perty shall immediately pass over and be given
 "up to my second daughter Frances Henry, to
 "whom, in that case, I give, devise, and be-
 "queath it." So that Ann had a life estate in the
 whole of the testator's property, if she married a
 man of equal or greater fortune, and, if not, then
 she had an estate for life in so much of the testa-
 tor's property as would be equal to that of her
 husband; and the rest was to go to the second
 daughter for life, with remainder to her sons suc-
 cessively in tail male as before. Ann took an estate,
 not on condition, but with a conditional limitation
 over in the whole property till she married; and on
 her marriage with a person not of equal fortune,
 the surplus was gone as if she were dead. By her
 marrying one of inferior fortune, there was an end
 of her life estate in the surplus, which went over,
 as if there had been a regular termination of the
 life estate; and the heir could not step in. This
 being an estate with a conditional limitation over,
 there is no difference whether the life estate ends by
 regular surrender, or forfeiture, or by the act of
 the party herself in breach of the condition; the
 heir does not step in, but the other estate. So I
 say that, as to the surplus, there is an end of the
 estates given to Ann and her issue by the will, and
 Frances being dead without issue, and the whole
 fee being divided between Ann and Hugh Henry,
 he steps in immediately. The law was so consi-
 dered in one or two cases, which I shall cite. In
 Lady Ann Fry's case, 1 Vent. 199. a testator de-

May 1, 5, 10,

1816.

June 12, 19,

1816.

 DEVISE VOID
 FOR UNCER-
 TAINTY, &c.

Fry v. Porter,

1 Vent. 199.

May 1, 5, 10, 1815. vised to his wife for life, and, after her death, to his grandchild in tail, provided she married with the consent of certain persons in the will named ; and if she married without such consent, or died without issue, then over. It was held that this was not a condition on the breach of which the heir might enter : but that the marriage of the grand-daughter, without such consent, determined her estate tail, and cast the possession immediately over. Therefore, though an estate tail was given to the grand-daughter, with a conditional limitation over, in case she married without consent, or died without issue, it was held that she had an estate tail, *quoadiu* she remained unmarried, and on her marriage without the appointed consent, the remainder over directly took effect. This is very applicable to the present case. Whether Ann had an estate for life, or in tail, is equally the same to my purpose. She had only an estate in the surplus till her marriage, and then Hugh Henry takes the whole, according to the reason of this case. So in a case 2 Mod. 7. where one devised lands to A. his heir at law, and other lands to B. in fee ; and that if A. molested B. by suit or otherwise, he should lose what was devised to him, and it should go to B. After the testator's death A. entered on the lands devised to B. and claimed them ; and this was held to be a limitation, which, by the breach of the condition, determined the heir's estate, and cast the possession on B. without entry. Here, likewise, Ann's estate in the surplus being determined by her marriage, the possession was immediately cast on Hugh Henry, the ultimate re-

1816.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

2 Lev. 21.—

8 Keb. 19.—

1 Ch. Ca. 142.

—1 Mod. 86.

200.

Shuttleworth
v. Barber,
2 Mod. 7.

remainder man. The case of *Goodright v. Cornish*, May 1, 5, 10, 1815, too, is material. That was a devise to A. for fifty years, if he should so long live, remainder to the heirs male of the body of A., remainder over. A. died without issue, and it was held that the estate went immediately over to Richard, the next devisee. The cases in Cruise's Digest, 505-6. and *Evelyn, or Avelyn v. Ward*, 1 Ves. 420. proceeded on the same principle. In the present case, though the proviso was that the surplus should go immediately over to the second daughter, it was not meant that, in case she should not be living, it should not go over at all. They argue that it was given over to Frances personally; that it was personal to her as if Ann had been bound to pay her 5,000*l.*, and that, they said, would not go to Hugh Henry. I admit that, for nothing in that case would be given to Hugh Henry. But this is a very different case. The intent was that, on failure of the preceding estates in any way, Hugh, the ultimate devisee in fee, should immediately take; especially, when the rule in *Willes* is applied, of considering, with a view to the intent, the state of things as they stood when the will was made. Your Lordships will observe then what is material in this will against their argument. The proviso does not extend merely to Ann's marriage, but also to that of Frances; and Frances, in case she lived, would be subject to it, and the remainder to Hugh Henry would take place under the same clause as before; which shows that the testator did not mean to exclude Hugh Henry. If it should be argued that the subsequent limitation over, in case of the daughters dying without issue,

DEVISE VOID
FOR UNCER-
TAINTY, &c.

Goodright, or
Goodwright
v. Cornish,
1 Salk. 226.—

4 Mod. 256.—
12 Mod. 52.—

1 Ld. Raym.
3, &c.

Avelyn v.
Ward, 1 Ves.
420.

Doe v. Under-
wood, Willes,
293.

May 1, 5, 10, gave an estate tail by implication to Ann, still I
1815.

June 12, 19,
1816.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

submit that it could never be the intent of the testator in the event which happened, that the issue of Ann should have the surplus, and that by the default of issue is meant such issue as could inherit, that is, inherit the surplus. The words are large and strong, "*all my estates*," and extend to the subsequent estate tail, as well as to the life estate. And the effect of the whole is this, that the estate tail as to the surplus is gone by her marriage. In

Loddington v.
Kime, 1 Salk.
224.—1 Lord
Raym. 908.—
3 Lev. 481.

Loddington v. Kime, 1 Salk. 224. where there was a devise to one for life, and if he had issue male, then to such issue and his heirs; and in several other cases, it was held that the subsequent devise to the issue did not give an estate tail to the ancestor. So here the subsequent words did not give Ann an estate tail, or if they did, it was subject to the proviso. The contingent remainders were destroyed as to the surplus by her marriage. Then the surplus is to be taken in proportion to the value of the fee simple, or of the estate given to Ann. Suppose she had an estate for life, with the remainder in tail eventually, and, Frances dying, an estate tail immediately; this is nearly equal to the fee simple, as she might have barred the entail, and it would be in effect a fee simple, and if she died it would go to her family. Then supposing the value of the fee simple, or of the estate which Ann would have taken, to be about 36,000*l.*, the heir at law of Hugh Henry would take what would be equal in value to five-sixths of that sum. If the proportion is to be taken according to the value of the life estate only, then he would take rather better

than half, or as twenty-five to twenty-four. The ^{May 1, 5, 10,} lessor of the plaintiff, the heir at law of Hugh ^{1815.} Henry, ought therefore to recover five-sixths of the ^{June 12, 19,} whole, or at least an undivided moiety. ^{1816.}

DEVISE VOID
FOR UNCER-
TAINTY, &c.

Lord Eldon (C.) The rule of the House is, that the defendant in error must go on, as the plaintiff has been heard, unless the parties consent to a different arrangement.

Mr. Hart (for Defts. in error). The question is whether, as Ann married a man of inferior fortune, Hugh Henry shall be permitted to shut out the limitations to the issue of the two daughters. I apprehend that on the face of the will there appears a specific contingency on which it must depend whether Hugh Henry could take. Under the previous limitations the daughters would only take life estates. But then the testator adds a clause, which by necessary implication gives the daughters themselves estates tail. The words, "in case my two daughters "die without issue," must be construed so as to give estates in tail general to the daughters, because if they took only estates for life, the devise over on a general failure of issue would be too remote. By necessary implication then, estates tail are interposed between the daughters and Hugh Henry. Taking that to be the case, the testator intended that Hugh should take only on failure of issue of his two daughters. The benefit of the penalty to which Ann was subjected by the proviso was confined to Frances personally, and the gift over to her is as if it had not been on the face of the will, she having

May 1, 5, 10, died in the testator's life-time. Suppose this case, 1815.
 June 12, 19, that Frances were living, and that Ann had married 1816.
 a man of equal fortune; her issue male would then

DEVISE VOID
 FOR UNCER-
 TAINTY, &c.

inherit, but her issue female would not till after failure of issue male of Frances. Then suppose Frances to have married a man of inferior fortune, and prevented her issue male from taking an estate in the surplus—Would it then go to Hugh Henry? No; but to the issue female of Ann; and the condition as far as regards Hugh Henry might be defeated by a common recovery. Frances died in the testator's life-time without issue; but the estates are given to Hugh Henry only in one event, viz., the death of both daughters without issue; and, Ann being alive, that event has not happened upon which he could take. Unless then, new words should be introduced into the will, so as to convert a condition of two dying without issue into a condition of one dying without issue, the heir of Hugh cannot take. There is a difficulty too in the form of the proceeding. It is an ejectment to recover one does not know what. When parties go into equity that difficulty must be dealt with; but a person bringing an ejectment must predicate what proportion he claims, and where are the words in the will which show the precise proportion? But if that difficulty could be got rid of, the devise over could carry only a proportion of Ann's life interest, for even, if Frances had survived, she could take nothing in prejudice of Ann's issue male. But as Frances did not live to claim even that interest in the surplus, the devise failed for want of an object.

Mr. Richardson (for Defts. in Error). In *Foster v. Lord Romney*, 11 East, 594. and in the cases there cited (*Denn d. Briddon v. Page*, and *Hay v. Lord Coventry*), it was admitted that, "in default of issue" generally, the Court would imply an estate tail, though it would not in these particular cases, where the words were "in default of such issue." Hugh Henry was to take only upon a general failure of issue of the two daughters, as it was plainly the object of the testator that he should be postponed until the families of the two daughters were discussed. That failure had not yet happened, and therefore he could not take. But in order to effectuate the intent of the testator in the limitation over to Hugh, it was necessary that Ann and Frances should take estates tail, and a conditional limitation over after an estate tail was nugatory and could not take effect as it might be so easily defeated, *Gulliver v. Shuckburgh Ashby*, 4. Bur. 1929. In the devise over on breach of the condition Hugh was not even named, and the surplus was given only to Frances who was not alive to take advantage of the devise. Though Ann should lose part of the estates by an inconsiderate marriage, it was not the intent of the testator that the estates to the innocent issue should be defeated, and no such intent can be implied, as appeared in the above cited case of *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929.—Hugh could only take by excluding the innocent issue of Ann, and though such a proviso as this may not be contrary to law yet it is not to be favoured, and they ought to come strictly within its words who claim by it. Mr. Holroyd argues that

May 1, 4, 10,
1815.

June 12, 10,
1816.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

Foster v. Lord Romney, 11
East, 594.—

*Denn d. Brid-
don v. Page*,
ib. 603.—

*Hay v. Lord
Coventry*, 3
T. R. 83.

*Gulliver v.
Ashby*, 4 Bur.
1929.

May 1, b, 10, 1816. this is a case of a series of limitations in which when one fails another is let in. But not one of the cases which he cites show that a person shall

DEVISE VOID
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TAINTY, &c.

Goodright v.
Cornish, 1
Salk, 226. and
Avelyn v.
Ward, 1 Ves.
420.

take who is not named. The cases of *Goodright v. Cornish*, and *Avelyn v. Ward*, were quite different. Suppose Ann married a man of competent estate and had only issue female, Frances if alive would then take on her death. Then suppose Frances married a man of inferior fortune, it could not be intended that Hugh Henry should come in to the exclusion of Ann's daughters. This shows the contradiction to the testator's intent which would take place in case the construction contended for by Mr. H. were to prevail. The fact is that the testator never contemplated any thing further than that Ann might marry so as to make the estates go over to Frances. The rest is only conjecture.—As to the point of form—under a claim of the entirety, a fractional part at least, as appears from the old real actions, may be recovered. But then it must be shown what is the entirety and what the fraction. The husband may have personal estate to meet the real estate of the wife, and how can it be ascertained in ejectment how much of the real is to be taken. It is such an undivided interest as was never heard of before in a Court of law. At any rate the Jury have not given the materials on which to found a judgment. Mr. H. says that Hugh may take five-sixths, as the fee and the estate tail were convertible. But there would be a wide difference in the market between a clear fee simple and such an interest as this. The extreme difficulty of dealing with this at law shows that the jurisdiction belongs

to another Court, to ascertain how much land is equivalent to a given sum of money.

May 1, 5, 10,
1815.
June 12, 19,
1816.

Mr. Holroyd (in reply). *Denn v. Purvis*, 1 Bur. 326. was a case where the Plaintiff in ejectment demanded a half and recovered a third, and in *Doe v. Wippell*, 1 Esp. N. P. Rep. 360. Lord Kenyon held that an undivided moiety might be recovered in a suit for the entirety. Then suppose I am right in that, sufficient is found on the special verdict to enable me to recover some proportion. Suppose Ann took an estate tail, and that estate should be considered as equal to the fee simple, then I recover five-sixths of the whole; if she took only a life estate, the Jury have found that value. But whether she took an estate for life or in tail, I am at all events entitled to recover a moiety, with liberty in another action to recover what I may be entitled to beyond that. Then putting that out of the case I proceed to the question on the will. If Ann took an estate tail, still I submit it was one in possession immediately on the death of the testator, because the matter stood in this way—(the lapsed devise to Frances being as if it had never been)—an estate tail in Ann with a subsequent vested limitation to Hugh in fee in case she died without issue. An estate for life was given to Ann; but where there is a life estate and remainder over in default of issue, that is an estate tail. But if Ann had had a son before breach of the condition, it would have been an estate for life in her, and an estate tail in her first son, with remainder in tail to Ann. But as it happened, the matter stood as if there had

DEVISE VOID
FOR UNCER-
TAINTY, &c.
May 5, 1815.
Denn v. Purvis,
1 Bur. 326.—
*Doe v. Wip-
pell*, 1 Esp.
N. P. R. 360.

May 5, 1815.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

been a default of issue of Ann; and the limitation to Hugh took place. So, suppose Ann took an estate tail liable to be opened by the contingencies as they arose, then, upon breach of the condition what estate would Frances have taken if alive? It must be the estate forfeited, and that (the estate tail) was the estate forfeited. But it is alleged that this was a devise to Frances personally, and that by her death it was gone. I submit however, that it was the testator's intention that, on breach of the condition, it should go to whoever had the next estate in remainder, and that Frances being out of the question, it went to Hugh. See the consequence if not. Did the testator mean to put it in the power of Ann by a prohibited marriage, to deprive Hugh of the ultimate remainder? Then all the preceding estates as to the surplus, Ann's estate tail and the contingent remainders depending upon it, being gone, the surplus went to Hugh. It was expressly given from Ann. A case is put that if after the breach Ann had had a daughter, she would have inherited as heir of entail of Ann, notwithstanding the breach. No: for as appears in the case already cited of *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929. and *Jermyn v. Arscot*, cited 1 Rep. 85. b. an estate tail cannot be forfeited in part and continued as to the residue. It was an estate tail then in Ann, and on the breach must be gone *in toto*, and Frances being out of the way, it passed to the next, as if it had been spent in the natural way, and both daughters had died without issue before the breach. I submit then that whoever was entitled to the next vested remainder was the one to take advantage of the

Gulliver v.
Ashby, 4 Bur.
1929.—
Jermyn v.
Arscot, 4
Leon. 83.—
1 And. 186.—
2 And. 7.—
Moore, 364.
and in 1 Rep.
85. (Corbet's
case).

breach. As to Frances it is clear, and she being May 5, 1815.
 out of the way the estate goes to Hugh Henry, as
 manifestly appears from the clause making the same DEVISE VOID FOR UNCERTAINTY, &c.
 condition as to Frances, on breach of which by
 Frances, Hugh would take; and so in the events
 which happened he must take it on the breach of
 the condition by Ann, otherwise she would have
 the power to deprive him of it, which was never
 intended to be given her. They say the ultimate
 remainder cannot take effect after an estate tail; I
 submit it by no means follows. The very moment the
 estate tail or life estate is gone the remainder takes
 place. Suppose Ann had died in the testator's life-
 time, leaving issue; still the estate tail would be
 lapsed, and then the ultimate remainder takes place
 immediately, and on this principle that the whole
 was given away from the heir at law, otherwise
 there would be two different fees. It has been
 stated that the devise to Frances was not a revoca-
 tion of the estate to Ann, but a method of preserv-
 ing it to be enjoyed by Frances. That is directly
 contrary to the words of the will. The life estate
 to Ann, being given on condition, cannot be consi-
 dered on breach of that condition as still existing
 in Frances. Suppose that after the breach it had
 gone to Frances and she had died, would it revert
 to Ann? No.—But it is said that a conditional limi-
 tation over cannot take effect after an estate tail,
 and *Gulliver v. Shuckburgh Ashby*, is cited. I 4 Bar. 1929.
 say it may be limited so as to go over before the —Fry's case 1
Vent. 199. &c.
 natural end of an estate tail, as in *Lady Ann Fry's* —Shuttle-
worth v. Bar-
ber, 2 Mod. 7.
 case, and the case in 2 Mod. 7. before cited. What
 was the case of *Gulliver v. Ashby*, as applied to

May 5, 1815.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

this? In that case lands were devised to several persons successively in tail "provided always and "this devise is expressly upon this condition, that "whenever it shall happen that the said estates shall "descend or come to any of the persons herein- "before named, that he or they do and shall "change their surname, and take upon them and "their heirs the surname of *W.* only, and not other- "wise:" but there was no limitation over on breach of that condition. The question there was whether it was to be considered as a conditional limitation, and the Court held that it was not, for it was not so expressly, the estate not being made to cease or go over upon breach of it, and it was not necessary to effectuate the testator's intention that such a limitation should be implied; for that would strip the issue of the tenant in tail, which could not be the testator's intention, and it was held to be a condition collateral and subsequent which was destroyed by common recovery. In the present case had Frances lived, Ann would only have had an estate for life with a remainder in tail, and could not have destroyed the condition, and here it must be considered as a conditional limitation, as there is an express devise over on breach of it. (*Lord Eldon (C.)* Suppose Ann and Frances had outlived the testator, and Ann had made an imprudent marriage, what estate would Frances have taken?) She would have taken an estate for life with contingent remainders to her first and other sons in tail male. But I submit the operation of this proviso is changed by the change of circumstances. In consequence of the death of Frances

the estate which Ann took was an estate tail, which May 5, 1816.
 was forfeited by breach of the condition, otherwise DEVISE VOID
FOR UNCER-
TAINTY, &c.
 she would keep it contrary to the intent of the
 testator. She had not a remainder in tail but an
 immediate estate tail, so that no estate tail stood
 between her estate and that of Hugh Henry; and
 her whole estate was forfeited, for an estate tail
 cannot go over in part and subsist in part.

SECOND CAUSE.

Sir S. Romilly (for Plaintiff in error, heir at law The heir at
law's case. of testator). This is a question purely of intention.
 —1st, What was the intent of testator?—2d, Whether his intent can take effect by the rules of law? The intent must be collected by looking at the circumstances as they stood when he made his will, and as if both daughters were alive. It is admitted that the condition is not against law, but it is said, that it is not one to be favoured. I cannot allow that; if it be consistent with law and the intent is clear, the Court has merely to see how the object can best be carried into execution. But I cannot conceive why it should not be favoured, the object being to guard the daughters against persons who would marry them merely for their fortunes—an object which, as the testator thought, would be best secured in this way.—Now whether this is to be considered as a condition, or a conditional limitation, the heir at law of the testator is entitled. I submit, however, it is to be considered as a conditional limitation, or if it be a condition, that it is one subsequent and not precedent. The objections

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to the claim of the heir I take to be of this kind,—that Ann took an estate tail in remainder, by implication, which in the events which happened was immediately vested in possession. If they cannot succeed in that, then I must show that Hugh did not take.—1st, Ann did not take an estate tail by implication but an estate for life, &c. with the ultimate remainder to Hugh, after an indefinite failure of issue of Ann and Frances, and the effect of the marriage was to give the surplus over to Frances in fee.—If Ann and Frances took estates tail, it must be by implication, and that is only permitted where it is necessary to effectuate the general intent of the testator, and never where there is a doubt to whom the estate is intended to go, and in what order. In the case of *Bamfield v. Popham*, 1 P. Wms. 54. there was a devise to A. for life, remainder to his first and other sons in tail male, and for want of issue male of A., remainder over; and it was contended that the tenant for life took an estate tail by implication, and that the codicil removed all doubt on the subject; but the Court held, that A. did not take an estate tail by implication, as it was not necessary to effectuate the intent of the testator. In the case of the *Attorney General v. Sutton*, 1 P. Wms. 754. a testator gave an estate for life to Sutton, remainder to his first and second sons (without going further) in tail male, and in case of Sutton's death without issue male, then over; and it was held, that Sutton took an estate tail by implication, on the principle that it was necessary to effectuate the testator's intention.

2 Vern. 427.
Colles. P. C.
1. 8.

2 Bro. P. C.
382. 8 Mod.
257.

But in the present case, the implying an estate tail, instead of effectuating the manifest general

intention of the testator, would disappoint his favourite object. If, however, such an estate is given, to whom and in what order is it given? and who takes first? If the breach took place before Ann's estate tail, then Frances would take first, and afterwards Ann. Can there be any case of more serious difficulty in this respect? But I say it is against the intent of the testator. In the other cause it was said that Ann had an estate tail which was forfeited. Then consider the intent of the testator; when he made his will he could not mean to give an estate tail at first to Ann. But it was argued that, in the event, as Frances was out of the way without issue, Ann took an estate tail on the death of the testator; but the intent clearly was, that they should take estates for life successively. The consequence of implying an estate tail in Ann would be this, an estate for life is given to Ann and then to Frances, then an estate tail to Ann. If Ann, during the life of Frances, married a man worth nothing against the condition, all the estates would go over to Frances; and if Frances were out of the way, Ann would take an estate tail, that is, the absolute dominion over the whole property. So that the effect would be, not that Ann would be punished for breach of the condition, but that she would take a larger estate, with power to defeat all the provisions made for her own children. This, then, is not a case where an estate tail can be implied.—2d. It was contended that Hugh took a vested remainder in fee in the events which happened. But if there was a fee before, the subsequent devise must be a contingent fee. The words of the will are, that the estates are to go to

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Hugh in case the daughters die without issue. Now the testator says, "I bequeath all my estates to the "first and every daughter of my eldest daughter, "Ann Henry, the elder to take before the younger." I submit they cannot take estates tail as the interest is not described. Then it may be said that they take for life; that would answer our purpose. But why for life? The words, "I give all my estates," are sufficient to pass a fee; and if this is a fee, Hugh could not take a vested remainder.—3d, In the event of Ann marrying a person of less fortune, the surplus passed over to the other daughter in fee.—Stronger words could not be used to pass a fee except the word—*heirs*.—"All the remainder of my "property shall immediately pass over," that is, all the remaining interest in the property, all that was not disposed of. There are a variety of cases in which such words have been held to pass a fee. But it may be said that, though the words would be sufficient to pass a fee, it was the testator's intention to give the surplus to Frances in the same manner as he had given her the estate before, in case of the death of Ann without issue. That is not the case, for then he would have annexed the same condition. But he has expressly given it to her in a different manner; so that there is nothing in the will to show that she would have taken an estate for life only in the surplus. The improbability of his intending that the property should pass over to Frances in fee is not such as the Courts will allow to outweigh the express words. He has in other respects expressed what nobody would ascribe to him, unless he had so expressed himself; and yet the Courts would not

meddle in opposition to the expression, though one ^{May 5, 1815.} cannot see the object of it. Then he directs that ^{DEVISE VOID FOR UNCERTAINTY, &c.} the rents, &c. shall be suffered to accumulate, without saying for what period, and estates to be purchased, "to the use of my eldest daughter, Ann Henry, which purchased estates shall be considered as a property I leave her in regard to the marriage she shall make as before mentioned."—Probably he intended that they should go according to the course of disposition with respect to his other estates; but he did not so express himself, and it would be too much for the Courts to say that he so intended. I apprehend the estates to be purchased with the accumulations would, upon breach of the condition, be considered as not disposed of at all. These, however, are not now in question, and I only mention them to show the difficulty of construing this will. And if the Courts do not adhere to the words, or manifest intention of the testator, but decide on the ground of probable intention, they will go farther than any Court has ever yet done.—Suppose then, Frances would have taken the surplus in fee if now living, that devise is lapsed, and the heir at law must take, not because he alone can take advantage of the condition broken, but because the fee is given to one who cannot take, and therefore he must take.—They say that, on failure of issue of Ann, or breach of the condition, Frances being out of the way, it must go over to him who has the next vested remainder, and for that they cite Lady Ann ^{Fry's case, 1 Vent. 199.} Fry's case, 1 Vent. 199. But that case has no resemblance to the present, for there it is so given over in exact words, and that is no authority for an in-

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ference that it shall so go over where no such thing is expressed. So in the case, 2 Mod. 7. the estate is expressly devised over in the event which happened, and I apprehend these do not at all make out the proposition. I do not trouble your Lordships on the question argued below, whether this is a condition, on breach of which the heir alone could enter, or a conditional limitation. The reason why I do not trouble your Lordships with that is, that in the present case, it is clearly a conditional limitation. But the heir at law is not here attempting to avail himself of a condition broken, but says that he must take because the fee is devised to one whose devise is lapsed.

Vid. Dr. Butt's case (cited), 10 Rep. 41. b. — *Dyer* 127. — *Scholastica's case*, Plowd.

Mr. Leach (for Plt. in Error—the heir at law of the testator). The heir claims all that is not given from him by plain expression, or necessary implication, as the Courts will not conjecture an heir at law out of his rights. The express intent always prevails with some qualification, and an expression is to be taken according to its plain import, unless on the whole instrument, it appears to be inconsistent with the general intent. So that there are cases where the plain import of an expression may give way to the general intent, but then it is only in one sense—that is, because the testator has not used the expression in its ordinary acceptance, but has manifestly attached to it a meaning of his own. I beg leave then to lead your Lordships, attending to these general rules, through the words of the will, and I hope that no particular difficulty will be found in the construction of it, having regard to the

principle, that the heir at law is not to be con-
 jectured out of his rights. The testator begins, &c. May 5, 1815.
 (Reads the will down to the words immediately fol- DEVISE VOID
 lowing, inclusive) "*And all the remainder of my* FOR UNCER-
"property shall immediately pass over, and be TAINITY, &c.
"given up to my second daughter, Frances Henry,
"to whom in that case I bequeath it." It is to
 this that I wish first to call your Lordships' atten-
 tion. Suppose the will had finished here, what
 estate would Frances have taken in this property?
 The plain import of the words is that she took an
 estate in fee. *Property* is a word of quantity and
 interest, and may carry a fee. (*Lord Eldon (C.)*
 Then what interest had Ann in the property she
 was to keep?) She of course would take what in-
 terest she would have at any rate. The devise of
 the surplus is substantive. Then why is not the
 plain import of the words to prevail? Is it to be
 said that Frances takes it, subject to the same limi-
 tations, as if the eldest daughter had died in the
 life time of the testator? Why conjecture this? The
 part that was to pass over might be the bulk of the
 testator's property, and it might be only a shilling;
 and can it be contended that he intended to subject
 this uncertain part of his property to the same limi-
 tations? Is it to be said that Frances would only
 take an estate for life, in this property, and that her
 life was substituted instead of Ann's life? Who
 then is the next in remainder? Is it Ann, or her
 son? Is he to take before Frances's son? If we
 depart from the plain import of the words, we are
 involved in difficulties which we cannot get rid of.
 It is singular, if the testator meant to prefer the son

May 5, 1815. of a prohibited marriage. Suppose then Frances's son takes—who is next if he fails? The next is the daughter of Ann, and is the property to go to the daughter of a prohibited marriage, in preference to the daughter of Frances? Still difficulties. Then suppose the will does not finish here, for the import of the expression may be affected by what comes after, as well as by what goes before. “And it shall also be necessary for the man my eldest daughter marries, &c. and to take the name and arms of Henry, &c. I devise and bequeath to Frances, an annuity, &c. to be paid every year, out of my estates, in two equal and even payments, to her and her issue; in failure of such issue, at her death, the said annuity shall revert back again, and return to my eldest daughter, Ann Henry, and her issue.” Now we come to an important part of the will: “*All I have said in regard to my eldest daughter, and her marriage, as above mentioned, I mean and intend shall stand good in regard also of my second daughter, Frances Henry.*” In what event is it so to stand good? “*In case, by the death of her eldest sister Ann, she shall, before she marries, come to be possessed of my estate as aforesaid:*” the plain meaning of which is, that if Frances, by the death of Ann, should stand in Ann's place, and enjoy the whole, then she was to be subject to the same condition as Ann. But suppose she does not take the whole, but only a portion, not by the death of Ann, but by Ann's prohibited marriage—is that portion subjected to this marriage prohibition? Then we must add the words, “or a portion of my estates.” But the

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testator has expressly said that it is only if she takes ^{May 5, 1815.} the whole of his estates that she is to be subject to the condition, and has left her entirely unfettered as ^{DEVISE VOID FOR UNCERTAINTY, &c.} to the portion ; so that this is strongly confirmatory of the plain import of the expression, which must prevail, otherwise the heir at law will be conjectured out of his right. Then let us see the rest : “ And “ also the rents, issues, and profits of all my aforesaid estates, except such parts as shall be necessary for a genteel maintenance and education of “ my two daughters above mentioned, shall be put “ out at interest, &c.” Now we come to a most important part of the will : “ *And it is my will “ and desire that in case my two daughters die “ without issue, that my estates shall then go to my “ brother Hugh Henry.*” All my estates—and in what event ? “ In case my two daughters die without issue.” Why so ? Because the bulk of his property was to pass to the issue of his daughters, according to the first series of limitations. Then is it not plain that what he gives to Hugh is not a surplus or portion, but that he looks only to the event in which the whole would continue united. So that whether Hugh’s remainder is contingent, or vested, the testator looks only to this course, and to the whole coming to Hugh. He is not here looking at all to a divided estate, once separated from Ann, but to the whole going over in the event of the failure of issue of his daughters. Has he given any remainder to Hugh Henry of a broken part ? No. Then is the plain import of the words passing a fee in the surplus to Frances, contradicted by any part of the will ? No ; but confirmed. Then if this

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construction is to prevail, the effect is clear. The estate is given to Ann for life, with a conditional limitation over to Frances in fee. That is a devise in a particular form. The devise fails; but the death of Frances cannot alter it, in this respect. The surplus passed from Ann, and would go to Frances; but she is dead, and then it is a common case that it vests in the heir at law. But suppose I cannot rest with confidence in this view of the case, and that I may be mistaken when I say that the surplus passed to Frances in fee. Ann cannot keep the surplus after the prohibited marriage—that is clear. The words are “if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries, and all the remainder of my property shall immediately pass over, &c.” If she says that she takes the whole, then she must contend that it shall not pass over—and how does she reason this? In her printed case she says nothing about an estate tail by implication. That is a new reason urged at the bar here. That however may be the result of more consideration. But on the general principle, this part of the case is clear. An estate tail can only be implied to effectuate the general intent of the testator. Is it then to be implied that she has an estate tail, notwithstanding her prohibited marriage? Is that according to the general intent of the testator? This as to the principle. But how is it on the particular form of expression in the will? Is it an estate for life or in fee that is given to Ann’s daughters? If it is a fee, then no remainder can be limited after it, though

a contingent fee may. The words are large enough ^{May 5, 1815.} for a fee. But they say it was not so intended. Is that clear? The words are: "In failure of such issue male, I bequeath all my said estates to the first, and every daughter of my eldest daughter, Ann Henry, above mentioned." Suppose he had rested there, would not this be a joint tenancy in fee to all the daughters? Then follows the words: "the elder to take before the younger;" which show that he did not intend a joint tenancy, but that the eldest should take the whole. The words are sufficient to carry a fee. But suppose there were some doubt here, the next consideration is, whether they took a larger estate than an estate for life. It could not be an estate tail, for more words of taking in succession could never have that effect. Assume then that it is a life estate "to the first and every daughter of my eldest daughter, &c., and in failure of such issue"—that is, in failure of such daughters, "I bequeath all my said estates to the first and every daughter of my second daughter, Frances, &c." What estates do the daughters of Frances take, vested or contingent remainders? Does he mean that if Ann has no daughters, the daughters of Frances shall take—or that if she has, and all of them should die? He must mean—if there be no daughters of Ann, and in that event, these are contingent remainders to the daughters of Frances. Then what if Frances's daughters fail also? We must look to him who is the object of the testator's bounty after his daughters and their issue; "it is my will and desire, in case my two daughters die without issue, that all my estates shall then go to

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May 5, 1815. "my brother, Hugh Henry." We bring up these words to the last failure of issue, and then they mean not a general failure of issue, but a failure of such issue; that is, of daughters, and then this is a contingent fee to take effect on failure of daughters of Ann and Frances. There cannot be a limitation after a general failure of issue, without implying an estate tail in testator's daughters. But an estate tail cannot be implied, except to effectuate the testator's intention, and here it would not effectuate, but defeat it, as it would give the daughter and her issue a larger estate, in the event of a prohibited marriage, than she had before.

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May 10, 1815. The effect of the Defendant's construction would be this, that if Frances had been alive, Ann would have only an estate for life, but that Frances being dead, she took an estate tail immediately by implication. But did the testator mean to give Ann a bounty on the death of Frances, contrary to the penal consequences of the prohibited marriage? (*Lord Eldon* (C.) What estate did Ann take in the part to which she remained entitled, and with what remainders over?) If there were no breach, the remainders would apply to the whole, and if part is excepted from the consequences of the breach, it of course remains subject to the remainders. (*Lord Eldon* (C.) What were the remainders after those to Ann's first and other sons?) I submit that the daughters took a fee. A gift to the first and every daughter would make them joint tenants; but the further words, "the elder to take before the younger," show that the eldest was to take the

whole in fee. If your Lordships do not follow that ^{May 10, 1815.} construction, it cannot be an estate tail, as these words cannot have that effect. Then they must be ^{DEVISE VOID FOR UNCERTAINTY, &c.} life estates, and the next remainder is contingent, "in case my two daughters die without issue, &c." The words are contingent; and a devise over, after a general failure of issue, is too remote and void, unless an estate tail can be implied. But it is enough that the remainder is contingent. I was about noticing an argument in the Court below, founded upon Dr. Butt's case, that the condition was destroyed by the remainder; but I feel a difficulty ^{Butt's case cited, 10 Rep. 41.} in understanding what the proposition is. The devise to Frances was not a remainder, but a conditional limitation; and if she took in fee there could be no remainder over. That then is not the way in which Ann points her argument. But suppose that the devise is not spent in Frances but applies to the whole series, then all the remainders must be conditional limitations, and so I do not understand how the doctrine in Dr. Butt's case applies. There was another point relied on below, and it is rather remarkable that it is not in the printed papers; that the condition is a condition subsequent, and that it does not take effect unless there is a devise over, and there is none here after the death of Frances. One cannot readily admit that no condition subsequent can be effectual except there be a devise over. But if that were the case, it does not apply here, because there is a devise over to Frances. The case of *Gulliver v. Ashby*, ^{4 Bar. 1929.} has been cited, and Lord Mansfield, in saying that the condition is *in terrorem* where there is no de-

May 10, 1815. *visc* over, does seem to lean to such a ground of decision. I cannot help thinking, however, that in a Court of law that could never be a proper ground of decision, though in equity it might. In that case there was a much better ground, viz. that it was an estate tail, and that the condition as to marriage was collateral and destroyed by the common recovery. But suppose the Judge below right, that a condition subsequent cannot be enforced unless there is a devise over. For what reason? Because it is considered as a desire and recommendation, unless there be a devise over. But the intention of the testator must be collected with reference to the circumstances as they stood when he made his will, as a devise is in the nature of a conveyance. Has he then merely recommended it to Ann not to marry a man of less property? "And if she marries, &c. I leave her only as much of mine as shall be equal to the property of the man she marries." That is no recommendation, but the interest is made to cease so far. But it is not enough for the heir at law of the testator to show that Ann is not entitled; he must show that *he* is, and therefore I must notice the case of Hugh Henry. They say that the effect of the breach and events is merely to accelerate the remainders. The first answer is that this is a conditional limitation in fee to Frances, and that the testator, in limiting these remainders, was looking to an undivided estate. But suppose the remainders were only accelerated, and that they apply to the separate property, the question is whether they are vested remainders. If the daughters of Ann took a fee, there cannot be remainders over.

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If they took only a life estate, the subsequent remainders were contingent. But the main argument is that from the words, "in case my two daughters ^{May 10, 1813.} "die without issue," the remainder to Hugh must ^{DEVISE WORD FOR UNCERTAINTY, &c.} be contingent, unless previous estates were given to all the issue, as it depends on a circumstance which may or may not happen. The only way to give it effect is to imply an estate tail in testator's daughters, which cannot be done consistently with his intention. (*Lord Eldon. (C.)* Suppose Ann had not disparaged herself, and Frances had lived.) There would be much more reason to imply an estate tail in that case, as there would not be a clear intent to the contrary. But we say that none of the limitations apply to the separate estate. If they do, and an estate tail is implied, then a bounty is given on the breach of the condition. We cannot look at the case now as if it stood without breach of the condition.

Mr. Hart (for Defts. in Error). The testator himself never contemplated the events which happened, and could have no intention respecting them. Then the only way of collecting the intention is to consider what he would have prescribed if the whole circumstances had been before him; and that is what is meant when we speak of the general intent of a will, and reject the particular where it is inconsistent with the general intent. Then let us look at the whole series of anterior limitations, and see who are the chief objects of the testator's bounty. His object seems to have been to create a family, and to perpetuate his name, and to limit the estate so as to

May 10, 1815. render it unalienable as far as the rules of law would permit. He gives his daughter Ann an estate for life, remainder to her first and other sons in tail male, so as to take by purchase from him, with a contingent limitation over till they came in *esse*: but the male issue was in no event to be disappointed. The next object of his bounty is Frances, to whom he gives an estate for life, with a vested remainder to her first and other sons in tail male as before. The female issue is the secondary object of his bounty; and it is asked what estates the daughters of Ann and Frances would take. That requires exposition from the context, for the terms render it doubtful. It is clear that Ann's daughters take in preference to Frances's daughters.

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Then see what he has done with a view to prevent intestacy. After the provisions respecting accumulation, &c., he comes to this devise; "my will and desire is, in case my two daughters die without issue, that all my estates shall then go to my brother Hugh Henry." The Courts are bound by the intent where it can take effect consistently with the rules of law; and the law hath said that a limitation over on a general failure of issue is too remote and void. But there is no difficulty now in such cases, as the Courts will imply estates tail in the anterior devisees; and if not implied here the general intent and scheme must fail, as the heir will come in where the testator has said in express terms that he should not. I am here arguing as if there had been no conditional clause in the will. In no event could Hugh Henry take till failure of issue of the two daughters, and by necessary implication,

to render the devise to him of any avail, the life May 10, 1815.
 estates of the daughters must be enlarged to estates DEVISE VOID
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 tail. So that on failure of issue there are general
 estates tail in the two daughters successively. True,
 there is no expression of intent as to the series in
 which the estates tail are to take effect, and Sir S.
 Romilly says that, in that case, estates tail cannot
 be implied. But the intent as to the series may be
 collected from the context. If an estate tail could
 be implied in one only daughter to whom an estate
 for life is first given, why not imply the same pre-
 ference as before expressed between the two daugh-
 ters with respect to the estates for life. Ann has
 an estate for life, remainder to her issue male in tail
 male, remainder to Frances for life, remainder to
 her issue male in tail male, remainder to Ann's issue
 female for life; remainder to Frances's issue female
 for life, and then the only next thing he could do
 in order to effectuate his general intent, was to give
 estates tail to his daughters in the same order and
 succession as before. Then by this means the gene-
 ral intent is perfected. The testator had as much
 attachment to the estate, as to the individuals who
 were the objects of his bounty. The daughters
 were less the objects of his bounty than their sons,
 to whom a larger estate was given. Then it is
 stated in argument, that the effect of this would be,
 that the breach of the condition would destroy Ann's
 life estate, and give her an estate tail. If the neces-
 sary effect of this construction were, that the tes-
 tator intended that the forfeiture of Ann should ex-
 tend to her issue male, &c., and vest an estate tail
 immediately in Ann, there would be a difficulty. But

May 10, 1815. it was an event which he never foresaw, and he did not consider that the younger daughter might go to the grave before the elder. But when they argue in this manner to show that there was no estate tail in Ann, they themselves argue that an estate in fee was given to Frances, destroying all the limitations to the male issue of Ann and the rest. So that if the matter depends on incongruity, that would be a strong argument against Frances taking the entire fee. On what principle is it that Ann's issue male should take a less estate for breach of the condition by Ann? And why should Frances take in fee? If the language were more strong than it is, that absurdity would be rejected. But when we look at the language here, we must be convinced that it never could be the testator's intention that Frances should take the surplus in fee in the event which happened. The words are "and all the remainder of my property shall pass over and be given up to my second daughter Frances, &c." It is said that, though there are no technical words of inheritance, *all my estates* apply to quantity of interest as well as to quantity of property, and I do not deny that, if not qualified by any other expressions, they might carry a fee in a will. But we must look at other words to see whether this means quantity of property or of interest in law. Your Lordships see that he is apportioning his property. The words in which he leaves to Ann as much of his property as should be equal to that of the man she married, might as well be considered as giving the absolute fee. But could it be contended with success that Ann took a fee in that? And yet the word *property* must

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be understood in the same sense as when the estate ^{May 10, 1825.} is given to Frances. But if the words are to be controlled with respect to Ann, they must be also controlled with respect to Frances, who therefore has not the absolute interest. If these words carry a fee, a still greater absurdity might be the consequence; for then, if Ann married a man worth within 100*l.*, of the whole of the testator's property, she would have the fee in the whole except that 100*l.*, and cut off all the subsequent limitations. This bequest over I consider as a penalty on Ann, and a bounty to Frances. The testator, leaving the general frame and scale of his devises untouched, meant to impose a particular obligation on Ann, and not on her issue. The limitation over then depended on the double contingency that Ann should commit a breach of the condition, and that Frances should be alive. And then if Frances was not alive, that provision could not take effect. Without that, every object of it was defeated. Where is the inconsistency in supposing Frances more the object of the testator's bounty in certain events than Ann? He takes from Ann, on breach by her of the condition, a particular proportion of his property, and gives it to Frances. But the gift to Frances was personal; and there is nothing in the will to show that it was the intent of the testator, if Frances did not live, to take the property from Ann. Frances had no immediate benefit under the will beyond 300*l.* a-year. But if Ann, to whom the bulk of his property was given, disparaged herself by her marriage, then a proportion was given over to her sister for life. The purpose of its going over was subor-

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dinate to that of Ann marrying a man of great property, and as Frances to whom it was to go was dead, that purpose failed. And as he had not passed it over to any other person in case of Frances's death, his intent was that, in that event, it should not go over at all. It was argued below that there was a devise over : but I conceive upon this ground the rule of law is that, on a condition broken, the heir alone shall enter. But the heir cannot enter on a partial interest ; and the Courts adopted another rule, that of a conditional limitation : for if it should be considered as a condition for which the heir could enter, that would destroy the remainders over ; but if it is a conditional limitation, who is to enter ? There is no rule for that. But the heir can only enter on two principles ; on a condition broken so as to have the old estate, or on failure of a devise. Then he cannot enter on the conditional limitation, Hugh remaining capable of taking. In no sense can the heir at law take, unless Frances took the entire fee ; a construction which would defeat the whole intent of the testator. There is an end then of the heir at law's case. So I submit that the penalty depended on a double contingency, and, that not happening, the provision failed. I do not deny that we do not thus complete the partial intent of the testator ; but that must yield to the general intention.

Mr. Richardson (for Defts. in Error.) In the first place, how do the estates stand independent of the proviso, "I give, devise, and bequeath all my estates," which is a phrase continued throughout, whether he gives for life, in tail, or in fee. The effect

is to give Ann an estate for life, with contingent remainders to her first and other sons; then to Frances for life, with contingent remainders to her first and other sons; then there are contingent remainders to the daughters of Ann in succession, which is material to show that they did not take a fee; and then he says, "I give, &c. all my said estates to the first and every daughter of Frances, &c.," which last words show that life estates were meant, as these words, applied to estates in succession, are not so strong as if applied to a singular estate, which might be a fee. And why give a fee to the daughters more than to the sons? and why in succession, as the elder would have a fee, and so might defeat the rest? I take the words, "failure of such issue," to mean failure of daughters of Ann, as in *Foster v. Lord Romney*,^{11 East. 594.} where estates were given to sons, and "in default of such issue," then over; the words, "such issue," were considered as meaning such son or sons. But I think it immaterial whether the daughters of Ann took for life or in tail, provided they did not take a fee, and they cannot take a fee. The testator clearly intended that his younger brother, Hugh, should take in preference to the heir; and, Hugh not taking till an indefinite failure of issue of A. and F., he cannot take at all, except estates tail are implied in A. and F. Sir S. Romilly says estates tail can only be implied to effectuate the testator's intention. True; but they have been implied in such cases as this. *Bamfield v. Popham* in P. Wms. was quite distinct; and the point was not raised there, as the estate was given over on failure of the issue male. In *Att. Gen. v. Sut-*

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^{Popham,}
^{1 P. Wms.}
^{54.}
^{1 P. Wms.}
^{754.}

May 12, 1815. *ton*, an estate tail was implied, except as to the trust property; so, also, in *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185. pl. 29. But the case I would particularly cite, is *Doe, d. Bean v. Halley*, 8 T. R. 5., where Lord Kenyon particularly relied upon *Robinson v. Robinson*, 1 Bur. 38, which had been discussed for 50 years in all the Courts. Though the expressions in that case of *Doe v. Halley* strongly favoured an estate for life, they were extended in order to effectuate the general intent of the testator, and the reason given by Lord Kenyon was, that the general intent was to exhaust one branch of the family before the estate should go over; and such is the case here. Then consider what is the effect of all this in the events which happened. The words of the proviso are—(reads them). Now the principal point of their argument is, that these words pass a fee, and that F. took the residue in fee. I am surprised at this, as it was not suggested below, nor is it in the printed cases. But possibly the words might carry a fee, if that were necessary to effectuate the intention of the testator. *Effects* and *property* may carry a fee; and it was said, by Lord Thurlow I think, that *all I am worth* would carry a fee. In *Doe, d. Andrew, v. Lainchbury*, 11 East. 290., *property* and *effects* were applied to real estate, such appearing to be the testator's intention; and a great number of other cases were there cited, to show that effects would, when necessary to effectuate the intention, carry the reality. But so to construe *property* here, would defeat the general intent. He did not mean that A. or F. should have the power to disinherit their issue. "And all the remainder, &c. shall pass

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*Langley v.
Baldwin*,
1 Eq. Ca.
Abr. 185. pl.
29.

*Doe, d. Bean
v. Halley*,
8 T. R. 5. et
ib. cit. *Robinson v. Robin-
son*, 1 Bur.
38.

*Doe, d. An-
drew v.
Lainchbury*,
11 East. 290.

“over, and be given up, &c.” It could not pass ^{May 10, 1815.} over and be given up, unless previously vested in Ann. Now Ann had not the fee, and so a fee ^{DEVISE VOID FOR UNCERTAINTY, &c.} could not be given up. (*Lord Eldon* (C.) In one of your printed cases the finding is this; that the lands and tenements in the within written declaration mentioned were, at the time of the said marriage, of the yearly value of 1683*l.* 19*s.* 4*d.*; and that the fee simple of the said lands was of the gross value of 38,856*l.* In the other printed case, and the difference is material, it is stated that the lands and tenements devised were of the yearly value, &c., without the words “in the within written declaration.” The difference is material in this way. The verdict finds that John Henry was seized of the lands and tenements in the within declaration mentioned, amongst others, in his demesne, as of fee, &c. In one way of putting the case, Ann would take as much of these lands, &c. as would be equal to 6,400*l.*; and this is represented as a sixth in two ways. In the one way it was a sixth of the lands in the declaration mentioned. In the other, it was a sixth in the lands devised by the testator; that is, not merely in the lands in the declaration, but in the whole real estate devised. And then the value was not to be calculated according to the value of the premises in the declaration, but according to the value of the whole.) That is a repugnancy in one point, for they intend to include the whole. (*Lord Eldon* (C.) Do you mean to say, that any judgment of this House can be given except on the record as it stands?) I do not allow that an ejectment can be sustained on this

May 10, 1815. *vague sort of interest.* *Sir S. Romilly.* It is consented that no such objection is to be taken, as the parties wish for a decision on the merits. The value can be ascertained afterwards. (*Lord Eldon (C.)* We cannot admit that on our record.) *Mr. Holroyd.* Enough appears on this special verdict to show that a certain proportion is recoverable. If the value of other lands is to be taken, the Plaintiff will have a larger proportion. But, under the verdict as it stands, he may recover a certain proportion; and it is no answer to say that he ought to recover a larger. *Mr. Richardson.* The answer of Mr. H. is not satisfactory, for, unless the whole is before the Court, I cannot conceive how a proportion is to be recovered. But, however, I do not press the point of form. Returning, then, to the merits, I say the testator could not mean to give a fee to Frances, as his object was to settle his property according to the course and scheme of succession mentioned in the will. *Mr. Leach* admitted that what remained was so settled; and why should not that which was given over to Frances? The effect of the proviso is merely to make a conditional limitation over to Frances. Now, where there can be no conditional limitation over, the previous estate is not displaced; and *Gulliver v. Ashby* is an authority for that proposition. It was held there that, for want of a limitation over, the previous estate was not displaced; but continued in the tenant in tail, who was capable of suffering a recovery; and the grounds upon which the previous estate was not displaced was the want of a limitation over. So I argue here that, if there is no person to take under

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the limitation over, the previous estate is not displaced. The devise over was personal to Frances, and the heir at law cannot take advantage of it, unless he can make out that this was a condition for breach of which the heir might enter; and so it was contended below to be. But, when they were pressed with the limitation over to Frances, they said it would be a conditional limitation if Frances were alive; but that, she being dead, it was a condition. It must be construed, however, as if she were alive; and, at any rate, the limitation to Hugh would be enough to prevent the entry of the heir as for a condition broken: and so it was decided in *Dr. Butt's case*. But even if the heir could enter for the condition broken: he cannot succeed, as he has not stated a sufficiently precise interest for a recovery by ejectment; and the judgment of the Court of K. B. below could not be sustained, even if your Lordships should on the other grounds be against us.

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TAINTY, &c.10 Rep. 41.
(*Mary Portington's case*.)

Sir S. Romilly (in reply) particularly insisted that no estates tail could be implied in the daughters Ann and Frances, because the order in which they were to take did not appear; and because such an implication would frustrate the intention of the testator; that Frances took a fee in the surplus; and that it was only in the event of her succeeding to the whole, that she was made subject to the condition; and that, the devise to Frances having lapsed, the heir at law took the surplus as undisposed of. (*Lord Eldon* (C.) Whether the interest given over is an interest of which possession could be de-

May 10, 1845. **DEVISE VOID FOR UNCERTAINTY, &c.** **livered under an ejectment, or whether the devise over is not void for uncertainty?** That is a conclusion which the House never comes to, if it can be avoided. *Lord Redesdale.* There is certainly a difficulty in that respect, as I find no distinct portion expressed in the will itself; and there is no writ by which a portion can be delivered, without mentioning the portion. If an ejectment is brought to recover two tenements, A. and B., there may be Guilty as to the one, and not Guilty as to the other; and the judgment to recover the one may be good. But I know of no instance of such a proceeding held good, without the portion's being mentioned.)

Lord Eldon (C.) stated the will and facts found on the special verdicts, again adverting to the difficulty that appeared to arise from the facts not being found with sufficient precision in the special verdict to enable the Court to give judgment upon them; and then observing, with reference to the proviso in the will, that the first consideration was, whether the subject of the devise over was described so clearly that the possession of it could be delivered under an ejectment, either as an entirety to be fixed by the proportion which the husband's property bore to that of the testator, or as some undivided aliquot part of the whole to be settled by a similar proportion, and to be held, by the person entitled, as tenant in common with Ann. And he proposed that the following questions should be put to the Judges.

Questions to be put to the judges.

1st. Whether, having regard to the facts and circumstances of the case and to the true intent and

construction of the testator's will, Ann, and her husband in her right, or Joseph Henry, the heir of Hugh Henry, or John Joseph Henry, the heir at law of the testator, are or is entitled to any and what estates or interests, estate or interest, in the lands and premises devised by the said will, or in any and what parts or portions, part or portion, thereof?

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The second question was whether, having regard to the facts in the special verdicts, if either of the Plaintiffs was entitled to any part or portion of the lands and premises, he could support the ejectment; and what judgment ought to be given in such ejectment?

The case was this day (June 12, 1816) argued again by one counsel on each side, upon the point whether the subject of the devise over, in case of Ann's marriage with a man of inferior fortune, was stated or described in the will with sufficient certainty.

Lord Eldon (C.) The Counsel will begin, who contends that it is given over with sufficient certainty.

Mr. Leach (for the heir at law). The Jury have made it sufficiently certain, and Ann will be entitled to an undivided sixth part or moiety of the whole, as tenant in common with the person entitled to the surplus. There is no physical impossibility as to making the devise certain, and, if it is void for uncertainty, that must depend on legal and technical principles. But it is difficult to conceive how legal and technical principles should be applied to pre-

Argument on
the point,
whether the
devise over was
not void for
uncertainty.

June 19, 1816. vent the intention of the testator from being fol-

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lowed, which is the great guide in the construction of wills; though in a conveyance such legal and technical principles must govern. These gifts of undistinguished portions are of two classes. They may be described by quantity or value. One seized of 500 acres may give 100 of them, without describing which. One having 500*l.* a year rent out of lands may give 100*l.* a year out of these lands without describing out of which of the lands in particular. First as to the undistinguished portions described by quantity, the result of all the authorities is this,—that it is no such uncertainty as in itself avoids the devise, but that it is in its nature sufficiently certain, the person to whom the gift is made having a right to elect. Where such gifts have been held void for uncertainty, the uncertainty has been in the manner of the gift. For example in *Vin. Abr. Tit. Election*, I find this first article: “If A., seized in fee of

Bullock v.
Burdett, Dyer,
281. A.—
Moore (Sir F.)
31, s. pl. 215.

“100 acres enfeoffs B. of eighteen acres of the 100 acres, without assigning which of the 100 acres he enfeoffs him of, to hold to B. and his heirs, at the election of B. and his heirs when he pleases, this is a void feoffment, so that this cannot be made good by any election, *because a livery cannot operate IN FUTURO, but ought to pass the freehold presently or never, and therefore the feoffment void.*”

The principle then is plain; a feoffment is nothing without livery, which must operate immediately, and there cannot be an election to make the gift good. The same doctrine appears in the notes to

Dyer, 8vo. Ed. Dyer. Rep. 281. a.—in Moore (Sir F.) 82. and in

Viner. Abr. Tit. *Fine*, and also in Vin. Abr. T. June 12, 1816.

Grants, 91. R. "If a man seized of forty acres
 "makes a feoffment of twenty acres to the use of
 "his son and wife for a jointure, this is good. So
 "a fine of twenty acres where the conusor had 100
 "acres is good, and the conusee shall choose; and
 "if a man levy a fine of fifteen acres of the manor
 "of D. it is good by election." (Arg. Moore, 82.)

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Why is the conusee to have his election? Because the use need not be immediately executed. The subject might be made certain, and then the use arises. So in the case of a devise, (Grace Marshal's case in a note to *Bullock v. Burdett*, Dyer, 281. A.) "A devise of two acres out of four is good, and the devisee shall elect." These authorities prove that there is no objection to the nature of the gift; the objection is to the mode, not to the substance.

12 Rep. 86.
 Stockdale's
 case.

2d. So it is when the subject of the gift is described not by quantity but by value; where it is described by quantity the certainty is effected by election; where it is described by value, the certainty is effected not by election but by valuation; and then the same consequences follow. Where the gifts are void, it is on account of the manner and not the substance, and so the authorities stand. The first authority *Woodhouse v. Futter*, is found in Dyer, 281. A. in a note to the case of *Bullock v. Burdett*; and also in 1 Roll. R. 187. "A man seized of lands of 500*l.* value, covenants by indenture to assure lands of 100*l.* value for a jointure, and makes feoffment of all the lands to the use of the inden-

Woodhouse v.
 Futter, 1 Ro.
 R. 187.

June 12, 1816. "ture. This is void for the uncertainty." And
 DEVISE VOID FOR UNCER-
 TAINTY, &c. *per* Cooke and Dodderidge, "If a man covenant
 "by indenture to make a feoffment to the use of
 "the indenture generally of lands of the value of
 "fifty marks, and does not particularly assign the
 "land, more shall not pass than the place itself
 "where livery was made." How could the land
 pass by feoffment and livery unless it was certain
 what was to be delivered? And in the case of a
 feoffment it could not be made good by subsequent
 valuation. In the several cases referred to in Vin.
 Abr. Tit. *Grants*, the same distinction was taken.
 So it was also in the case of *Thomas v. Kenn or Mor-*
gan, Hetley, 67. Dyer, 281. A. where "a fine was
 "levied to the use of the conusees to be seized of
 "so much land as should be worth 30*l.* *per annum*,
 "to be assigned and set out in several by J. S.
 "adjudged, as no assignment was made, that it was
 "void; otherwise if the assignment or valuation had
 "been made." The next case, *Gibbon v. Warner*,
 was in the note in Dyer, 281. A. and in 2 Roll.
 R. 425. "Sir T. F. devised his manor of—— to his
 "executors, in trust that they should be seized of 100
 "marks of that manor to the use of one, and of
 "another part of the value of 20*l.* to the use of
 "another, and that a division should be made by the
 "executors, and that the whole manor should be
 "valued at 100*l.* and no more. Adjudged that this
 "was sufficiently certain, and that the *cestui-que-uses*
 "shall be tenants in common immediately without
 "division. But this case was put by Richardson in
 Flet. 67. 97. "the argument in *Thomas v. Morgan*, and agreed to
 "be law, that it is to be taken that the value of the

Thomas and
 Kenn's case,
 Arg. Litt. Rep.
 217.—Hetley,
 67, 97.

Gibbon v.
 Warner, 2
 Roll. Rep.
 425.—Dyer,
 281. A. N.

“manor was expressed in the will, and that he said June 12, 1816.
 “was the reason of the judgment.” True, the value
 of the manor was expressed in the will, but the parti- DEVISE VOID
 cular portions must still be rendered certain by val- FOR UNCER-
 uation. If Richardson was right there, all the other TAINTY, &c.
 authorities are wrong. The result of the whole is, that
 the portion here may be set out, or that the lands
 may be held in common, and that in either way
 the devise may be made certain, though the latter
 is the more convenient.

The case was argued on the same grounds for the Sir Walter
 heir of Hugh Henry, the ultimate devisee; and Sir Hungerford's
 Walter Hungerford's case, Leon. 30.
 case, Leon. 30. pl. 36., and
 Calthorpe's case, Dyer, 334. B., Moore 101. 247. Calthorpe's
 case, Dyer,
 were cited. (*Lord Eldon* (C.) If the remainder 334. B.—
 man had the election here, could he support the Moore 101.
 ejectment?) Yes, because the election may be made 247.
 at any time, and he may elect the whole and recover
pro tanto.

Mr. Hart (for Defts. in error.) The ejector
 must make out to what he is entitled as a distinct
 and definite proportion, though to be held in
 common. They have produced a great deal of
 ancient learning as to grants and devises; but they
 pass very cursorily over the point as to what dis-
 tinct portion they claim. These are authorities to
 show that what is indefinite may be made definite.
 That is quite a common maxim, *id certum est quod*
certum reddi potest. But how do they bear upon
 this case? Cases of this kind must be determined
 on the language of the instrument. The whole of
 their principle is to be found in *Bullock v. Burdett*, *Bullock v.*

June 12, 1816. *Dyer*, 281. A. and in the notes of Ch. J. Treby, which are authorities themselves, independent of the authorities there referred to. A grant is to be taken most strongly against the grantor, but if uncertain it is void. It is admitted that in *Gibbon v. Burdett*, *Dyer*, 281. A. *Warner*, the proportion was pointed out; all the ratios were there ascertained, and in these the devisees were tenants in common. The case of *Bullock v. Burdett*, does not depend on the livery, but on the wide principle that the feoffment was void for the uncertainty. But it has no bearing on this case. Who is to elect here? The question here is merely whether the testator has described with sufficient certainty what he meant to pass. The testator gave Ann the rents and profits of the estates from the time of his death, and he describes her as having been born in 1783, and at the time of making his will she was an infant of three years of age. Then he gave her a life estate, and then there was a minority of about fifteen years after the death of the testator before she could be capable of contracting. He goes on to Frances, and presuming a failure of issue, he gives, as we say, an estate tail to Ann after failure of the intermediate male issue. Of such a species of property, depending on so many contingencies, it is difficult to ascertain the value. The testator has not in the devise over expressed whether he meant the value of the life estate and its contingencies, or included the benefits before given to the issue of Ann. Is the value to be estimated at the time of the marriage? or is the Court to have a retrospect to the hour of the testator's death, and include the rents and pro-

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Burdett,

Dyer, 281. A.

Gibbon v.

Warner, 2

Roll. R. 425.

fits from that time? The testator has given over, June 12, 1816. one cannot conjecture what. The portion cannot be found by quantity or value if left to be ascertained by the will, so that the devise is in its terms uncertain and cannot have effect.

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TAINTY, &c.

Leach (in reply.) If I understand the argument of Mr. Hart, he says, that it is difficult, and even impossible here to ascertain the portion, though, in general, it may be done. I submit it may be done in this case; and there I must leave it.

Gibbs (Ch. J. C. B., delivering the opinion of June 12, 1816. all the Judges.) The first question put to us is, Judgment. whether, having regard to the facts and circumstances of the case, and to the true intent and construction of the testator's will, Ann and her husband in her right, or Joseph Henry the heir of Hugh Henry, or John Joseph Henry the heir at law of the testator, are or is entitled to any and what estates or interests, estate or interest, in the lands and premises devised by the said will, or in any and what parts or portions, part or portion thereof. It will not be necessary to state the record of the case, as the whole has been so recently before your Lordships. But we are all of opinion, upon the facts and circumstances stated in this record, that Ann is entitled to all the lands, during the term of her natural life; and that neither Joseph Henry, nor John Joseph Henry, have or has any estate or interest in the lands and premises mentioned, nor in any part or portion thereof. This being our opinion on the first

June 12, 1816. question, it is unnecessary to give any opinion on the second.

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The point on which the first question turns, arises on the proviso giving over some part of the estates, in the event of the marriage of Ann Henry to a man with a fortune inferior to that which was left her by the testator. The proviso is in these terms : —“ But I give, devise, and bequeath all my said “ estates abovementioned to my eldest daughter “ Ann Henry aforesaid, on this proviso and express “ condition, that she marries a man really and *bond* “ *fide* possessed of a property, at least equal, if not “ greater, than the one I leave her. And if she “ marries a man with less property than that, in “ that case, I leave her only as much of mine as “ shall be equal to the property of the man she “ marries; and all the remainder of my property “ shall immediately pass over and be given up to “ my second daughter Frances Henry.” This aims at creating a conditional limitation over, on the event of Ann’s marrying a person of inferior fortune : but we think the devise over is void for uncertainty, and that the proviso cannot have effect, though the event in which it was to operate has taken place.

The devise
void for un-
certainty.

In what the
uncertainty
consists.

The uncertainty is this. The will gives over an uncertain part, not specifying lands if to be held in severalty ; or, if this should be considered as an undivided portion in the whole, it cannot be discovered from the will what that portion is. It has hardly been contended, that any thing was given over in severalty ; but it was contended, with more colour, that the person to take the excess, beyond the husband’s property, would be tenant in com-

mon with Ann, of a moiety or some other given share. June 12, 1816

It is impossible to put the case upon any other ground than this. A portion is given over, and it cannot be a portion to be held in severalty. The only way then is, that the person to take the excess shall have some undivided portion of the whole; and if the devise defines what that interest is, it will be sufficient to give its objects the benefit of it. But we think that the devise does not define any specific interest which the objects of it can take.

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The only ground upon which this can be contended to be a tenancy in common, which supposes some specific share, is, that it may be left to a jury to decide according to the values. The inconvenience and confusion which would result from this is obvious: different juries would set different values on the respective properties of the husband and wife; and the valuation must be made too at the period of the marriage, and at any distance of time, a jury might be called upon to say what was the value of the property. It would not only be difficult, but in some cases impossible, to ascertain the value in this way.

Our opinion, however, does not rest on the inconvenience and confusion, but on the principle of law, that such a devise is not sufficient to create a tenancy in common. If it were so, it must be upon the marriage of Ann; and all the consequences of a tenancy in common must then have taken place. The parties must at that point of time be tenants in common, and then they would be so without the possibility of saying what is the share

Unless the specific interest or share appears on the face of the will, the devise is not sufficient to create a tenancy in common.

June 12, 1816. of each. It has been said that this is no objection ;
 but I wish that a case had been mentioned of a
 tenancy in common, without the possibility of
 knowing from the instrument creating it of what
 specific share or portion each was tenant in common.
 Great industry has been evinced on the part of the
 Gentlemen at the Bar, but no such case has been
 produced.

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I have stated that if this be a tenancy in common
 it must be on the marriage of Ann ; and then they
 must have been subject to all the calls and conse-
 quences to which tenants in common are legally
 liable ; they must have been capable of being sepa-
 rately sued in all real actions, and in actions of
 ejectment, a modern proceeding, which has come
 in the place of real actions. Now, in every real
 action, though we do not know from the writ, it
 must appear in the declaration what is the specific
 interest in question, how the title is derived, and
 what the precise interest is ; but here there is no
 such thing. At the time of Ann's marriage it could
 not be collected from the will what the specific in-
 terest was.

If they were in the situation of tenants in com-
 mon, see how they could answer. A creditor, who
 has a demand against one of them, institutes his
 suit, and proceeds to get the lands by *elegit*. He
 has judgment for a moiety of the share, and the
 sheriff is directed to deliver a moiety. But the
 share must appear in order to enable the sheriff to
 deliver the moiety ; and no case has ever occurred,
 where the difficulty has been cast on the sheriff to
 ascertain the share. And there is no instance of a

tenancy in common, where the extent of the interest could not be ascertained from the instrument creating it. June 12, 1816.

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This difficulty too presents itself. Tenants in common have each a right to a writ of partition. The writ does not state the share, but in the declaration the precise interest is stated. I have looked at a great number of such declarations, and I have found none which does not state the title; and which does not state in precise terms what the specific interest is, and does not state the interest as so specifically appearing on the face of the instrument creating the tenancy in common.

With these inconveniences then, and upon these principles, we are of opinion, that this will does not sufficiently point out what each is to take; and that the specific interest, or share of each, does not appear from the will or instrument which aims at creating the tenancy in common. The will does not sufficiently point out what share each is to take.

We have bestowed some industry upon this case, and we have found some authorities, but not many. The authorities examined. Thomas and Kenn, or Morgan's case, is referred to in a note in Dyer, 281. A. and the argument is given in Hetley, 67. 97. and more at length in Littleton's Reports, 217. The roll has been searched, and it appears that on a special verdict the judgment was for the Defendant. It was argued for the Defendant in this way: "If they are tenants in common they might have partition, which they cannot have here, for it is impossible to declare the fifth part in certain, and the jury cannot make it certain; for one jury may value at one rate, and another at another." I do not mention that as Dyer, 8vo. ed.

Le jury ne
peut faire cer-
tain. Litt.

R.

June 12, 1816.

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FOR UNCER-
TAINTY, &c.

authority, but refer to the report merely for the facts of the case. It was a deed to lead the uses of a fine, the conusees to be seized of so much land as should be worth 30*l.* per annum. It was insisted, on the one side, that this was sufficient to create a tenancy in common, and for the Defendant it was contended that it could not be a tenancy in common, because no certain specific share appeared. Neither in Hetley nor in Littleton is the judgment mentioned; but on searching the roll, it appears to have been for the Defendant on a special verdict. There were other points in the case, and it does not appear what the particular ground of the judgment was; but how it was understood appears from the history of another case which I shall mention.

Dyer, 281. a.

Without considering the principal case of *Bullock v. Burdett*, I refer to the marginal notes, which are always to be regarded with deference, coming from an authority so considerable as Ch. J. Treby, where the cases of Gibbon and Warner, and Thomas and Kenn, or Morgan, are stated and compared.—

Gibbon v.
Warner.

“ Sir Thomas Fulmerston devised a manor to his
“ executors, in trust that they should be seized of
“ 100 marks, part of that manor to the use of one,
“ and of another part, to the value of 20 marks, to
“ the use of another; and of another part, to the
“ value of 20*l.*, to the use of another:—and that a
“ division should be made by the executors, and
“ that the whole manor should be valued at 100*l.*
“ and no more. Adjudged, that this was suffi-
“ ently certain, and that the *cestui-que-uses* shall
“ be tenants in common immediately without divi-
“ sion. But this case was put by Richardson in the

“ argument in Thomas and Morgan, and agreed to June 12, 1816.
 “ be law ; that it is to be taken, *that the value of* ^{DEVISE VOID}
 “ *the manor was expressed* in the will, and that, he ^{FOR UNCER-}
 “ said, was the ground of the judgment. Thomas ^{TAINTY, &c.}
 “ and Morgan was the case of a fine levied to uses,
 “ the conusees to be seized of so much land as
 “ should be worth 30*l.* per annum to be assigned,
 “ and set out in several by J. S. Adjudged, as no
 “ assignment was made that this was void for the
 “ uncertainty ; and that the conusees should not
 “ enter, nor be tenants in common with others, to
 “ whom the residue was limited.”

What is the fair result then from these two cases ?
 that if a man seized of lands devises part of the
 lands to the value of 30*l.* in money, and the whole
 is valued at 60*l.*, no doubt the devisee takes a moiety
 as tenant in common, as the proportion is clear ;
 that is the case of *Gibbon v. Warner*. But sup-
 pose it had been a part to the value of 30*l.* without
 mentioning the value of the whole land, it would be
 impossible to say what precise interest or share he
 takes till the value is ascertained.

The principle of our decision then is, that the in- Principle of
 terest or share must appear on the instrument itself. the decision,
 that the in-
 terest or share
 must appear
 on the face of
 the instru-
 ment, creat-
 ing the te-
 nancy in com-
 mou.

In the case of *Gibbon and Warner* it did so appear,
 and that was held good. In the other case it did
 not so appear, and that was adjudged to be void for
 the uncertainty.

Apply that principle to the present case. What is
 here given over is the difference between the fortune The devise
 of the husband and that of the testator. We can void for un-
 certainty.
 not find from the instrument what that interest or

June 12, 1816. share is, and so we are of opinion, that the devise is void for uncertainty.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

The point of
uncertainty
first suggested
in the House
of Lords.

Lord Eldon (C.) In the very particular circumstances of this case, I should propose to allow a few days for consideration before the final decision. It is a very important case in principle, and very important to the parties in point of value, and it has been argued below principally upon grounds other than those upon which the opinion of the Judges has now been delivered. That point, indeed, hardly occurred to them at all below, but was suggested here. The House has heard the argument at the bar, and I have to say, that I have received a great deal of information from the bar and from the Judges. But I cannot state that I am so fully satisfied in my own mind upon the whole of the case as to advise your Lordships to proceed immediately to final judgment.

June 19, 1816. *Lord Redesdale.* (After mentioning the parties and stating proceedings), the question is, whether the devise over in the will of John Henry can take effect in favour of the ultimate devisee or heir at law.

The will. The testator gave the estates in this way: after bequeathing some legacies, he gave and devised the estates in question to his elder illegitimate daughter, Ann Henry, for life, and after her death to her first and other sons in tail male; and in failure of such issue male, to his second illegitimate daughter, Frances Henry, for life, and after her death to her first and other sons in tail male; and on failure of

such issue male, to the first and every daughter of June 19, 1816.
 Ann, and then to the first and every daughter of
 Frances.—And then came the clause on which the DEVISE VOID
FOR UNCER-
TAINTY, &c.
 question turns:—"I give and devise, &c. all my
 " estates above-mentioned to my eldest daughter,
 " Ann Henry, aforesaid, on this proviso and express Proviso on
which the
question arose.
 " condition only, viz. that she marry a man who
 " is really and *bond fide* possessed of a property, at
 " least equal, if not greater, than the one I leave
 " her: and if she marries a man with less property
 " than that, I in that case leave her only as much
 " of mine as shall be equal to the property of the
 " man she marries; and all the remainder of my
 " property shall immediately pass over, and be given
 " up to my second daughter, Frances Henry, &c."
 And then he gave an annuity of 300*l.* a-year,
 charged on the estates, to Frances and her issue,
 &c.—(States the remainder of the will *prout ante.*)

The facts were, that Ann survived the testator,
 and that Frances died in his life time without issue;
 and he died seized of the estates in question, leaving
 his daughter, Ann Henry, his heir at law; Joseph
 Henry, and the ultimate devisee, Hugh Henry, him
 surviving. Joseph Henry died, leaving John Joseph
 Henry his heir at law; and Hugh died, leaving
 Joseph Henry his heir at law.

Ann married Hancock, whose fortune was infe- Marriage of
Ann.
 rior in amount to that which was left her by the
 testator, and the excess or surplus was claimed by
 the respective heirs of Joseph Henry, the heir at
 law, and of Hugh Henry, the ultimate devisee.
 John Joseph Henry insisted that the disposition to

June 19, 1816. Hugh did not carry the fee, or that if it did, it was only in case both the daughters died without issue.

DEVISE VOID
FOR UNCER-
TAINTY, &c.

Facts in the
verdicts.

The facts were found by special verdicts in these two ejectments, and it was stated in the verdicts that at the time of the marriage of Ann Henry with Hancock he was possessed of a personal property of the value of 6,400*l.* in the whole, and of no other property; that the estates devised were at the time of the yearly value of 1,638*l.* 19*s.* 4*d.* and that the fee simple was of the gross value of 38,856*l.* The verdict also found that an estate in one-sixth part of the fee simple of the whole lands was equal in value to the whole of Hancock's property at the time of the marriage; and that an estate for life of Ann Henry in one-half of the said lands was equal in value, at the time of the said marriage, to the whole of Hancock's property, intimating, that if the fee simple was to be the subject of calculation, then one-sixth of the whole was to be retained by Ann and her husband; and if the estate for life was to be the subject of calculation, then one-half was to be retained. The verdict further found, that at the time of the marriage, John Joseph Henry, the heir at law of the testator, entered upon and became seized of the lands, and demised them to Long, and that Long entered and took possession of the lands until ejected by Hancock and Ann his wife, and the other parties mentioned; and then they submitted the questions arising in the cause to the Court.

The case was argued in the Court of King's Bench, and judgment was given for Long, the lessee of the heir at law, for the excess above the

fortune of Hancock at the time of the marriage ; ^{June 19, 1816.} and the Court was of opinion, that judgment ought to be entered for the Defendants, as to one undi- ^{DEVISE VOID FOR UNCER- TAINTY, &c.} vided sixth part of the lands, and the Plaintiff for the other five-sixths. Upon error brought in the Exchequer Chamber, the judgment of the Court of K. B. was reversed, and thereupon the Plaintiff brought his writ of error in this House.

The question in both the ejectments is the same in derogation of the title of Ann. The disposition made by this will gives the legal estate in the whole lands to Ann for life, and the first question arose upon the operation of the clause, giving over the excess beyond her husband's property from Ann in case she married a man of inferior fortune.

After argument, two questions were put to the Judges ; and the answer given by the Judges was, that Ann was entitled to all the lands for her life at least, and that neither John Joseph nor John Henry are entitled to any estate or interest in the same ; and that it was not necessary to give any opinion on the second question. The effect of this is, that as ^{Effect of the answer of the Judges to the questions.} Ann is entitled for life to all the lands, neither of the ejectments can be supported, and that the judgment of the Exchequer Chamber ought to be affirmed. The ground of this opinion was, that, by ^{Ground of the opinion of the Judges.} the disposition over, in case Ann married a man of inferior fortune, which, as was contended, created a tenancy in common, Ann, and the person to take along with her, must from the nature of a tenancy in common each have in certainty their respective portions, and that the portions were not distinguished with sufficient certainty in the will ; and

June 19, 1816. that the will did not offer a ground on which to determine with sufficient certainty what should go over. And the law not admitting that uncertainty in the disposition of property, the will must be considered as, so far, void for uncertainty. That is sufficient to determine the ejectments.

**DEVISE VOID
FOR UNCER-
TAINTY, &c.**

**Grounds of
the judgment
below.**

It seems, however, that this point hardly came under the view of the Courts below, and they decided upon the construction of the whole will. And the Court of Exchequer Chamber was of opinion that John Henry could not support his claim, as the event of the daughter's dying without issue had not happened, and John Joseph could not support his claim, as, if Ann's issue failed, the next estate must take effect, and the next estate was an implied estate tail in Ann.

**Ann has the
whole for life,
whatever be-
comes of the
question after-
wards.**

It is not necessary for us to go farther than the Judges have done, that is, farther than to say, that the devise over did not affect the devise to Ann for her life, without saying any thing as to what may be the effect of the will after her death. No ejectment then can be sustained during her life, whatever may be the effect after her death; and Ann being entitled to hold the whole estate during her life, the ejectments cannot be sustained, and therefore the judgment must be affirmed in both cases.

Lord Eldon (C.) It had occurred to me at first that the facts as found upon the special verdict were not sufficient to enable the Court to give judgment on the ejectments; but on further consideration I thought they were sufficient. I was anxious to take full time to consider the case, as the point upon

which the Judges have given their opinion hardly occurred to them at all in the Courts below. I think, however, that the opinion of the Judges is well considered, and well founded, and that the judgment ought to be affirmed. And I should be disposed, independent of the opinion of the Judges as to this point, to consider, upon the whole of the case, the judgment of the Court of Exchequer Chamber as the better judgment. And I say further, suppose it were not the better judgment on the principles stated in the Court below, that yet under the very particular words of this will it would be very difficult to support either of the ejectments.

June 19, 1816.
 I DEVISE VOID
 FOR UNCER-
 TAINTY, &c.
 The Lord
 Chancellor
 concurs in the
 ground of
 judgment
 stated by the
 Judges here,
 and, inde-
 pendent of
 that, is of opi-
 nion that, on
 the whole
 case, the judg-
 ment of the
 Ex. Ch. be-
 low was the
 better judg-
 ment.

Judgment of the Court of Exchequer Chamber in both cases *affirmed*.

Agent for Plaintiff in error, PINKETT.

Agent for Defendant in error, LANE.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

STACPOOLE (WILLIAM)—*Appellant*.

STACPOOLE (GEORGE) and others—*Respondents*.

AND

STACPOOLE (GEORGE)—*Appellant*.

STACPOOLE (WILLIAM) and others—*Respondents*.

Administration taken out in 1771. Distribution to a certain extent made, but a large sum retained on unfounded pre-
 March 4, 6, 8, June 26, 1816.

March 4, 6, 8;
June 26, 1816.

ADMINISTRA-
TION.—IN-
TEREST.—
COSTS.—PAR-
TIES.—AC-
COUNT, &c.

tences. No effectual suit against the administrator till 1792, and that protracted, in a great measure, by the administrator's fault, in the Court below till 1810; held by the House of Lords, reversing in that respect decrees of the Irish Chancery, that, notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, about 16,000*l.* or 17,000*l.*, during the whole period of retention; and that the account should be taken with annual rests, and that interest be charged on the annual balances; and also that the administrator should pay to the Plaintiff his costs of suit incurred subsequent to the original decree, &c. &c.

1771. Death
of intestate
John Stac-
poole, leaving
ten next of
kin, and
George Stac-
poole heir at
law.

THIS case arose upon the distribution of the personal estate of John Stacpoole, of Craighbrien, who, being seized and possessed of very considerable real and personal estates, died in 1771 intestate, a widower, and without issue. John, the intestate, had a brother and three sisters, who died in John's life time leaving a child or children, in all ten in number. Francis the brother left two children, George and Frances. Upon the death of John, therefore, George Stacpoole became entitled to the real estate as heir at law, and the personal property became divisible among the ten next of kin: and George the heir at law having the largest fortune, it appeared to most of the next of kin that the administration should be confided to him, and he took out administration accordingly.

George Stac-
poole the heir
at law admin-
isters.

Intestate's per-
sonal estate.

Arrear of
rents.—Bond
and mortgage
&c.

When John died, an inventory was taken of his personal property; part of which, it is material to observe, consisted of a large arrear of rents, and of a bond and mortgage dated July 1763, for a prin-

capital sum of 2,000*l.* with the interest thereon, due to John from a relation of the name of Philip Stacpoole. The expenses of John's funeral amounted to 1,200*l.*; and George was encouraged in going to this expense by two of the next of kin, for the purpose of deriving a profit from it to themselves as tradesmen.

March 4, 6, 8;
June 26, 1816.

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

Funeral expenses 1200*l.*

In 1772 George Stacpoole left Ireland, and from that time resided in England, leaving the care of collecting the assets and of the administration to one Croasdaile Malony, an attorney. No distribution having been immediately made, the next of kin became clamorous; and one of them of the name of Arthur

1772. G. Stacpoole the administrator leaves Ireland, leaving the administration to Croasdaile Malony.

filed a bill in 1772 for an account and distribution: to which George, in M^c term 1772, and February 1773, put in answers setting out an account of the

Bill for account, &c. 1772.

personal property: but that suit was not further prosecuted, and is only mentioned as it was a point

Answers.

Suit not prosecuted.

disputed whether George had then rendered a full and fair account, that account differing from what the Master afterwards in another suit found to be the true account of the intestate's personal property, though nothing seems to have turned upon that ground in the ultimate judgment. In 1772 and

from that to 1776, several sums and securities for money, were divided among the next of kin, but in very unequal proportions, amounting to about 11,000*l.* in the whole, though considerably short

Distribution to a certain extent made, but in unequal proportions.

of the real amount of the personal estate. No steps, however, were taken in a Court of Justice to enforce distribution for twenty years from the time of the commencement of the suit in 1772.

From 1772 till 1792, no proceedings in a Court of Justice to enforce full distribution.

At length the Appellant in the original appeal,

March 4, 6, 8;
June 26, 1816.

ADMINISTRA-
TION.—IN-
TEREST.—
COSTS.—PAR-
TIES.—AC-
COUNT, &c.
1792. Bill
by William
Stacpoole the
Appellant.

Answers.

Length of
time.

G. Stacpoole
insists, in his
answer, that
arrears of rent,
&c. belonged
to him as heir
at law.

1800. Decree.

No direction
to charge the
administrator
with interest,
nor to make
distribution.

William Stacpoole, as administrator and only child of Barbara Stacpoole, one of the next of kin of John Stacpoole, the intestate, in 1792 filed a bill in the Court of Chancery against George Stacpoole, for an account and distribution, making the other next of kin parties Defendants, and stating the matters aforesaid, and that George had possessed himself of personal assets of the intestate to the amount of 36,000*l*. George in March 1773, put in an answer which was found insufficient; and then after standing out process to a sequestration, he, in May 1794, put in a further answer, and insisted on the length of time as fully as if he had pleaded it in bar. The bill was then amended, and to this amended bill George put in his answer in May 1795 insisting upon various claims against the assets; and stating that he was advised that the arrears of rent due at the death of John Stacpoole were not assets; but incident to the reversion, and that they belonged to him, George Stacpoole, as heir at law; and that the household furniture, implements of husbandry, cattle, and other articles, were heir looms, and belonged to him as heir to the mansion.

The case came on to be heard in 1800, before Lord Clare, who decreed an account to be taken by the Master of the personal estate of the intestate, debts, legacies, and funeral expenses; the reference being merely to ascertain the amount of the personal estate. It was stated in the printed papers that the Master afterwards applied to Lord Redesdale, when his Lordship was Lord Chancellor of Ireland, for directions whether he might, though

not directed so to do by the decree, charge George Stacpoole with interest on the balance due from him, and make distribution among the next of kin ; and that his Lordship directed him to do it. This however was denied by Lord Redesdale.

March 4, 6, 8;
June 26, 1816.

ADMINISTRA-
TION.—IN-
TEREST.—
COSTS.—PAR-
TIES.—AC-
COUNT, &c.

The Master in 1805 made his report, stating that the amount of the intestate's personal estate at the time of his death was 31,473*l.*, which with interest at five per cent. amounted to 89,582*l.* and a fraction ; that George Stacpoole had paid debts, funeral expenses, &c. amounting to 4,906*l.* and a fraction, and had besides distributed to the next of kin sums which with interest amounted to 27,277*l.* and a fraction, making together a sum of 32,184*l.* and a fraction, for which he gave George Stacpoole credit; and this being deducted from the above 89,582*l.* left a balance, including interest, of 57,398*l.* and a fraction to be accounted for ; and then the Master found the several distributive shares out of this last sum, giving George credit for 16,935*l.* and a fraction, as the shares of himself and his deceased sister.

1805. Report
stating the
amount of
personal estate
with interest,
and making
distribution.

To this report George Stacpoole took fourteen exceptions :—1st, For that the Master had without authority from the decree made distribution :—2d, That the Master had without authority charged the administrator with interest :—3d, That he had refused G. Stacpoole credit for several considerable sums, alleged to have come to the hands of John Stacpoole, out of the personal estate of Francis Stacpoole, George's father. The 4th related to the same matter :—5th, That the Master had refused G. Stacpoole credit for 500*l.* poundage al-

Fourteen ex-
ceptions by
the adminis-
trator.

March 4, 6, 8; June 26, 1816. owed to Croasdaile Malony for agency in the administration :—6th, That he had refused G. S.

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

credit for a sum of 235*l.* paid by G. S. for rent, repairs, servants' wages, &c. on account of an estate called Violet Hill, which John Stacpoole the intestate had in his lifetime given up to G. Stacpoole. (In order to explain this exception it is necessary to state that John Stacpoole, for fifteen or sixteen years before his death considering George Stacpoole as his heir, had made him large and liberal allowances corresponding to his fortune, and among other things had given him this estate of Violet Hill ; and George insisted that the charges connected with that estate incurred in John's lifetime, ought to be paid out of the intestate's assets ; but the Master was of opinion that John meant that George should pay these charges.) 7th, Not material :—8th, That the Master had only allowed 200*l.* for the funeral expenses though the expence was 1,237*l.* :—9th, and 10th, Not material : 11th, That the Master had debited G. Stacpoole with a sum of 5,900*l.* principal and interest, due on a bond and mortgage of Philip Stacpoole, dated July 1763, and the exception also applied to a sum of 265*l.* charged against G. Stacpoole in respect of a principal sum of 100*l.* arrear of rent of the lands of Dunnbegg, which more properly related to the subject of the 14th exception. (As to the 2000*l.* bond, it appeared that Philip Stacpoole was a nephew of the intestate John Stacpoole, and his tenant of the lands of *Cahiraginick*, under a lease for his own life at 90*l.* rent, of which a considerable arrear had accrued due. Philip

This sum of 100*l.* did not appear to be properly arrear of rent, but paid to G. S. for some future interest in the lands.

Stacpoole was also indebted to John in this sum of 2000*l.* and interest, and applied to John Stacpoole to release him from the debt and arrear, upon his surrendering his lease. John, it appeared, did not consent; but Philip executed an assignment of his interest in the lands to a William Considine, as trustee for John Stacpoole, in consideration of surrendering the lease, in the hope that at a more favourable opportunity John would be induced to consent; but there was no evidence that John accepted of it) 12th, That the Master had charged G. S. with a sum of 1,500*l.* due on bond from one Hogan to John Stacpoole the intestate, though it was alleged to be part of a sum borrowed by John Stacpoole from Francis the father of George:—13th, That the Master had charged George with a sum of 68*l.* due to the intestate, on a note of Patrick Lysaght, though it was part of another sum of 88*l.* afterwards secured by bond, also charged against George, so that, as George contended, he was charged double:—14th, That the Master had charged George with 870*l.* as arrears of rent of the lands of Dunbegg, and with 822*l.* as a deficiency in credit given by George for other arrears of rent, and for sums due on securities, though, as was alleged, these arrears had been released by John Stacpoole in his life-time, and were not due at his death, and had not been received, and though the securities had been unproductive without any wilful default or neglect of the administrator.

The cause came on for hearing on the report, *ex-* 1807. Consent
ceptions, and merits, in 1807, before Lord Chan- of parties that
cause be heard

March 4, 6, 8;
June 26, 1816.

ADMINISTRA-
TION.—IN-
TEREST.—
COSTS.—PAR-
TIES.—AC-
COUNT, &c.

March 4, 6, 8; cellor Ponsonby; the parties having agreed in open Court that the cause should be heard as if the

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c. as if original decree had directed account to be taken with and without interest. Master had been directed by the original decree to take the account both ways, with and without interest charged, and the Lord Chancellor being of opinion that interest ought to be charged, and that the sum of 5,900*l.* was properly charged against G. Stacpoole, which were the two chief points of the original appeal, decreed that the 2d and 11th exceptions should be over-ruled, and also the 1st, 3d, 4th, 6th, 12th, and 13th, and as to the other exceptions some inquiries were directed which it is not material to state.

Decree that interest ought to be charged against the administrator.

Two questions chiefly on original appeal: 1st. Whether interest should be charged: 2d. Whether a sum of 5,900*l.* should be charged against the administrator.

Decree 1803. Whether G. S. had rendered a true account in 1772, &c.

Decree of 1808, that the administrator ought not to be charged with the 5,900*l.*

The cause again came on for hearing in May, 1808, when it was ordered that the Master should inquire whether George Stacpoole had rendered a true account of the assets in 1772 (with reference probably to the question whether interest ought or ought not to be charged). And it was also ordered, as to the third exception, that George Stacpoole should be allowed a sum of 2,600*l.* with interest from the intestate's death, said to have been paid by him in 1775 to his sister Frances, as part of his father's personal property received by the intestate; and it was also ordered as to the eleventh exception that George should be allowed the claim of 5,900*l.* The Master altered his report accordingly, and reported that G. Stacpoole had *not* rendered a full account of the personal estate in 1772, as the amount, as then stated in his answer, was 27,137*l.*, and according to the altered report the gross amount was 29,078*l.* To this report George took ten exceptions.

In July 1810, the cause came on for hearing on March 4, 6, 8; the reports, exceptions, and merits; when the Court decreed that these ten last exceptions should be overruled, and the Master's report confirmed without prejudice to the question of interest; that the second exception to the report of 1805 should be allowed, as under the circumstances of the case George ought not to be charged with interest, and the Master was directed to rectify his report accordingly, and it was ordered that plaintiff and defendants should abide their own costs until further order. The Master having made his report finding that a principal sum of 17,910*l.* still remained to be distributed, the charge of interest being disallowed, the report was confirmed by order of Dec. 6, 1810, by consent of the parties, without prejudice to the right of appealing. On December 17, 1810, the cause was finally heard, when it was decreed that the costs of the parties, except those of George Stacpoole the administrator, should be paid out of the fund, and the several shares should be distributed to the next of kin or their representatives.

March 4, 6, 8;
June 26, 1816.

ADMINISTRATOR.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

Decree of 1810, that the administrator ought not to be charged with interest.

Costs of parties (except the administrator's) to be paid out of the fund.

From these decrees the plaintiff, William Stacpoole appealed, in as far as they decided that interest was not to be charged on the balance found due and distributable: 2*d*, In as far as they decided that George Stacpoole ought not to be charged with the 5,900*l.*: 3*d*, In as far as they directed that the costs should be paid out of the fund, because, under the circumstances, George, the administrator, ought to pay the costs. George lodged his cross appeal against the decrees in so far as they over-ruled his exceptions and demands against the intestate's es-

Original appeal. Three questions—interest—5,900*l.* costs.

Cross appeal by the administrator.

March 4, 6, 8; tate; and also as to the matter of costs, insisting
 June 26, 1816.

ADMINISTRATION.—IN-
 TEREST.—

COSTS.—PAR-
 TIES.—AC-
 COUNT, &c.

Hearing in
 Dom. Proc.
 1816, but
 cause stands
 over for defect
 of parties.

Proceedings
 making the
 other next of
 kin parties to
 both appeals.

that his costs also ought to be paid out of the fund.

To these appeals the other next of kin or representa-
 tives were not made parties.

The cause came on for hearing in the House of
 Lords in March, 1815, when it appeared to their
 Lordships that the other next of kin or their re-
 presentatives ought to be before the House, and the
 cause stood over until they were brought forward.

On petition therefore of the Appellant in the ori-
 ginal appeal amended by making the other next of
 kin, or their representatives, parties, an order was
 made on the 25th of April, 1815, whereby they
 were ordered to put in their answers in writing on
 or before the 30th of May following, and they put
 in their answers accordingly. On the first of the
 said month of May, 1815, an order was made on
 petition of the Appellant in the cross appeal, also
 amended so as to make these next of kin, or their
 representatives parties, that they should put in their
 answers in writing on or before the 5th of June
 then next; but this order was not served till the
 end of July 1815, so that the hearing was pre-
 vented for that session. They were thus made Re-
 spondents in both appeals, and, in the printed case
 prepared for them, claimed the benefit of the appeal
 by William Stacpoole, the Appellant in the original
 appeal; and further insisted that the demand of
 George Stacpoole against the intestate's assets, for
 the sum of 2,600*l.* alleged by him to have been
 paid to his sister Frances in 1775, on account of her
 alleged proportion of their father Francis's assets,
 ought not to be allowed, as there was no evidence

The other
 next of kin
 made Re-
 spondents in
 both appeals,
 and claim be-
 nefit of origi-
 nal appeal,
 and insist on
 appealing as to
 a further point.

of any such payment except the assertion of George Stacpoole, in one of his answers filed in May 1795, against which there were circumstances of strong presumption; Frances having died in 1741, and George having come of age in 1756, and administered to his father without ever having made any demand of this kind against the intestate, who expended very large sums for him and his sister previous to his death in 1771, being thirty years after the death of Frances. And they also urged the circumstance that John Stacpoole was not the guardian of the fortune of George and his sister, but only of their persons, and that George Stacpoole had got possession of all the intestate's letters, vouchers, and receipts, and had mutilated his books of account of his money transactions, producing only some leaves torn out of them which had a very suspicious appearance.

March 4, 6, 8;
June 26, 1816.

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

No notice however was taken in the ultimate judgment of the objection as to the allowance to G. Stacpoole of this sum of 2,600*l*.

No notice taken by the Lords of the appeal as to the new point. Hearing 1816. Question as to the 5,900*l*.

1st, With respect to the question as to the 5,900*l*. and whether John the intestate had released the bond and mortgage for 2000*l*. to Philip Stacpoole, it was contended for George Stacpoole the administrator, that there had been such a contract as Philip could have enforced against John, had John been alive.

(*Lord Eldon* (C.) If John himself was not bound to release, then, nothing done after his death by George Stacpoole could bind the rest of the personal representatives. If John was bound, then it signifies nothing what was done after his death,

March 4, 6, 8; because his agreement would have altered the nature
 June 26, 1816.

ADMINISTRA- done.)

TION.—IN-
 TEREST.—

COSTS.—PAR-
 TIES.—AC-
 COUNT, &c.

of the property, though no subsequent act had been done.) It was argued that the inference from the circumstances was, that the surrender had been made to Considine with the consent of John, especially as no inquiry had been made about the rent for twenty years. The inadequacy of price was to be noticed only as a presumption of fraud, but where it appeared that one party intended a bounty, the presumption of fraud was rebutted, and he was bound. On the other hand it was contended that the inference was the other way, as the mortgage, was in John's possession at the time of his death, and there was no evidence of any agreement by John to release.

Question of
 interest.

2d, As to the question of interest, it was contended for George Stacpoole that, as there had been great delay in calling for the account, and as the balance was that of a contested account where there were good grounds to contest it, the administrator ought not to be charged with interest in the present case. Lord Hardwicke had said that it was not of course to charge an administrator with interest, and

Gr. Wilkins v.
 Hunt, 2 Atk.
 151.

as George Stacpoole had been allowed to go on for so long a time dealing with this money, and considering, and spending it as his own, without any suit effectually prosecuted against him, it was unreasonable now to charge him with interest. On the ground of acquiescence for a great length of time, Courts of Justice had dispensed with the ordinary rules of evidence, and admitted items in account on

the oath of the party without vouchers, as in *Morgan v. Lewes*. On the other side it was contended, that it was strange reasoning to say that because one spent his neighbour's property in ignorance, he was therefore not to be held bound to restore it. Whether it was ignorance or fraud, he was bound to restore it. Under one of the decrees, George was bound to show that he had given an accurate statement of the account in 1772, and it appeared that he had not given an accurate statement. If he had fallen into a fair mistake, and given a fair representation, then it would have been a case for 5 per cent. interest. But it was not fair, and therefore, the full legal rate of Irish interest, 6 per cent. ought to be charged. And as to the delay, the bill was filed in 1792, and from that time at any rate there was an end of the argument as to spending the money in ignorance.

3d, It was made a question in the course of the hearing whether, as the other next of kin had not appealed from the decree below, they would be entitled to the benefit of the appeal by William Stacpoole, they not having disclaimed, though they now came forward and prayed the benefit of the appeal. And a case was put by the Lord Chancellor; suppose, after the decree had made them all actors, the 2,000*l.* bond in question had been disallowed in the report, and William Stacpoole had excepted, and the exception had been allowed; would the other next of kin be entitled to the benefit of the exception? Nothing however was said upon this point in the ultimate judgment.

4th, It appeared that John Stacpoole had made

March 4, 6, 8;
June 16, 1816.

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

Whether the other next of kin entitled to benefit of the appeal.

Agreement to settle lands,

March 4, 6, 8; an agreement voluntary on the face of it, but which June 16, 1816.

ADMINISTRATION.—IN-
TEREST.—

COSTS.—PARTIES.—AC-
COUNT, &c.

whether satisfied by suffer-
ing lands to
descend.

was, notwithstanding, alleged to be for valuable consideration, to invest a sum of 1,000*l.*, part of a sum of 3,000*l.* due to John on mortgage, in the purchase of land, to be settled on his brother Francis for life, and his first and other sons in tail male. This not having been done, George claimed the 1,000*l.* and interests against the assets. But John had purchased the mortgaged premises and suffered them to descend to George, and it was contended that, supposing the agreement to be for valuable consideration, this was sufficient performance on the authority of *Sowden v. Sowden*, 1 Bro. Ch. Cas. 582. and that class of cases.

Irish Chan-
cery practice.

5th, With reference to a practice of the Irish Chancery, Lord Redesdale observed; “the sequestration was the first effectual process in Ireland until I reformed the practice, and a very abominable practice it was. The delay was the same; all previous processes were issued and the time run out, and then an *non est inventus* to the attachment, they moved for the sequestration.”

Evidence not
printed whe-
ther to be
read.

6th, Objections were made at the bar to the reading of evidence not printed, and to the printing of observations without signature of counsel. (*Lord Eldon* (C.)) The rule of the House as to the printing of evidence is made for the purpose of guarding itself; but it is competent to the House to hear other evidence not printed, if it thinks proper. The parties are to print what they think material, but in such a case as this, it is rather too much to suppose that any one can infallibly say what is and is not material. As to the other point in a case under

the names of *Eamer v. Fisher*, or some such names, March 4, 6, 8, the noble Lord then on the woosack called the June 26, 1816.
agent to the bar, and censured him for printing observations without signature of counsel.)

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

Mr. Leach and *Mr. Horner* for Appellant in original, and Respondent in cross appeal.

Sir S. Romilly, *Mr. Hart*, and *Mr. Wetherall* for Respondent in original, and Appellant in cross appeal.

Mr. Blake for the other next of kin.

Agent censured for printing observations without signature of counsel.

Lord Redesdale (after stating the case).—On June 26, 1816. these two appeals the questions in their order are Judgment.
these: 1st, as to the 5,900*l.*, that the principal sum was due on mortgage to the intestate from Philip Stacpoole is unquestionable. But George Stacpoole insisted that John Stacpoole had agreed that this sum of 2,500*l.* should be liquidated by a transaction with Philip. There was a good deal of evidence on this point, but nothing to show that John Stacpoole had in his life-time given up this mortgage to Philip, and if he had not relinquished it effectually, it was then still a debt to be demanded by George Stacpoole as administrator. George, however, had thought proper to release this debt, taking to himself the benefit of the consideration which was not adequate, so that it would have been in some measure voluntary on the part of John. But it does not appear that he ever did abandon the mortgage; and as there is no evidence that he accepted the surrender of the lease as the consideration, it must be held to be a debt due to John Stacpoole at the Question as to the 5,900*l.*

March 4, 6, 8; time of his death, which George Stacpoole had no right to release. As to that sum therefore, the

ADMINISTRATION.—INTEREST.—

COSTS.—PARTIES.—ACCOUNT, &c.

The 5,000*l.* ought to have been charged against the administrator, and the decree wrong as to that point.

The administrator ought also to have been charged with interest.

Reasons for charging interest against the administrator.

Masters' report appears to have been right, and the Lord Chancellor's decree wrong.

The original appeal then complains that interest was not allowed on the balances. Now I must confess, I cannot conceive, on what ground the Court refused to allow interest. John Stacpoole died in 1771, and near forty years after, in 1810, a great part of his property remains undistributed in the hands of George Stacpoole the administrator. Some payments were made long ago to the several next of kin, but in very unequal proportions; and, from that inequality, those who received the larger payments would have an undue advantage over the rest, unless those who received the smaller payments were allowed interest. But there are other grounds upon which the claim for interest may be sustained; for all the embarrassments and delays in the distribution of this property have been occasioned by George Stacpoole himself. The different items and particulars in the account of John Stacpoole's property were not complicated, and it was the duty of the administrator to distribute as soon as he could. As to the 5,000*l.* composed of a principal sum of 2,500*l.* and interest thereon, surely, interest ought to be allowed on that as it was a sum which, if allowed to remain as it was, would have produced interest.

Demands of the administrator in respect of his father's assets.

Another demand made by the administrator was of this nature. Francis Stacpoole, the brother of John, and father of George Stacpoole, the admi-

nistrator, died in 1741, leaving a widow and two children; namely, George Stacpoole and Frances his sister. George insisted that, some how or other, John had possessed himself of the personal estate of Francis, and evidence was gone into on that head, and the result was this—that it was true that John had interfered to secure the property for the children of Francis, and that he had in his hands a sum of 2,600*l.* belonging to the sister Frances. As to the other demands upon this ground, it appeared that George had been living with his uncle, John Stacpoole, the intestate, for fifteen or sixteen years, and had received from his uncle the estate of Violet Hill, where he resided; and yet, during all that time, George never made any such demands against his uncle, the intestate, in his life-time; so that it is clearly to be presumed, as the Court below did, that all demands of that sort had been satisfied: but as to the 2,600*l.* belonging to the sister, and which George alleged he paid to her, that was allowed by the Court, and no exception was taken to that allowance. Sums of between 5,000*l.* and 6,000*l.* were thus cut off from these demands on this ground. These, however, were the grounds on which George Stacpoole insisted upon being allowed these payments, and kept 10,000*l.* in his hands to answer such demands; and it seems clear that he ought to pay interest on the sum which, on the result of the accounts, appeared to remain due to the next of kin.

March 4, 6,
8; June 26,
1816.

ADMINISTRATION.—IN-
TEREST.—
COSTS.—PARTIES.—AC-
COUNT, &c.

No demands
of that kind
made by
George in
John's life-
time, and to
be presumed
that they were
satisfied.

As to the matter of costs, the decree appears not to be perfectly correct, as all the embarrassment and expense, and the delay, by avoiding, as long

Costs.

The costs sub-
sequent to the
original decree

March 4, 6,
8; June 26,
1816.

ADMINISTRA-
TION.—IN-
TEREST.—
COSTS.—PAR-
TIES.—AC-
COUNT, &c.

to be paid by
the adminis-
trator.

as possible, the taking and settling the accounts, were owing to George Stacpoole. On every proceeding, before answer, before examination put in, before evidence produced, he stood out to the issuing of sequestrations, in order to keep in his own hands property which, as administrator, he was bound to account for and distribute fully and fairly, and as soon as possible. All the next of kin had an equal right to the administration; but had trusted it to him on account of his ample fortune. I think, therefore, that from the time of the original decree, the costs of the Plaintiff in the cause ought to be borne by George Stacpoole, as they were all occasioned by him, except merely the costs of taking the account, which were comparatively small: and it would have been much better for them to have paid this expense, if they could have got the matter settled at once, as then they would have had the property much sooner.

Cross appeal.

The cross appeal applies first to the disallowance of the demands of George Stacpoole against the assets of the intestate, in respect of his father's property, except as to the sum of 2,600*l.*; and so far I have already stated the Court below was right

Administrator
not allowed to
set off a charge
for poundage
alleged to have
been paid to
his agent in
the adminis-
tration.

in over-ruling the exception. So with respect to the matter of the fifth exception, which relates to the claim of poundage; that seems an extraordinary charge, and one of which it is difficult to comprehend the ground. I cannot judge on what ground such a charge was made by Malony, and I do not see how the decree can in this respect be altered, as the Court below had more assistance and better means of judging of the propriety of such a charge than we have, and

they have decided that it ought not to be allowed; and whether it was really paid to Malony or not is doubtful.

The sixth exception relates to the disallowance of the demand in respect of the rents, servants' wages, and repairs connected with the estate of Violet Hill; and certainly this is a very extraordinary charge. John had permitted George Stacpoole to have the full enjoyment of that estate, leaving it to George to pay the rents due out of it, and connected with his own enjoyment; and John could have had no conception that he was to be charged with any of these expenses.

ADMINISTRATION.—(RENTS.—PARCAGES.—ACCOUNTS, &c. Violet Hill estate.

The eighth exception related to the funeral expenses, which amounted to an enormous sum for such an occasion, and two of the next of kin appear to have had some concern in these expenses, for the purpose of gaining some benefit by it as tradesmen. But George Stacpoole was bound to control this; and the other next of kin could not be charged for the acts of these two; and the two could have had no notion that they were to pay their proportion of the expense, otherwise they could have had no profit as tradesmen. The Master and the Court thought that 200*l.* was a sufficient sum for the funeral, and it would be too much to overturn the decision as to that point.

Funeral expenses.

Then comes the eleventh exception, as to the 5,900*l.*, which I have already mentioned; and the arrears of rent of the lands of Dunbegg, which will come more properly when we consider the fourteenth exception. The twelfth exception related to a sum of 1,500*l.*, with which G. Stacpoole

March 4, 6, 8; also *reversed* as to the question of interest, and it
 June 26, 1816.

ADMINISTRA-
 TION.—IN-
 TEREST.—
 COSTS.—PAR-
 TIES.—AC-
 COUNT, &c.

was ordered that the full legal rate of interest on the sum remaining undistributed should be charged against the administrator, making annual rests in the accounts, and charging interest on the annual balances. The decrees were also *reversed* in so far as they directed the costs of the plaintiff to be paid out of the fund, and it was ordered that the administrator should pay all the Plaintiff's costs, subsequent to the original decree in 1800. And it was ordered that G. S. should be charged with the arrears of rent, and it was referred back to the master to review his report as to the several sums stated as arrears of rent, and as to whether and how far they were due at death of John Stacpoole, and were received, or without wilful neglect, &c. might have been received by G. Stacpoole, &c.; and the decrees, so far as not reversed or varied, to be affirmed.

Agent for Appellant, WILLIAM STACPOOLE KEANE.
 Agents for Respondents. G. STACPOOLE, WILLIAMS, and
 BROOKS,

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MOORE—*Appellant*.

BLAKE and another—*Respondents*.

—1815.
 March 20,
 1816.

A. CONVEYS (or assigns his interest in) lands to B. in consideration, among other things, that B. shall make or give a lease back again to A. of a half or portion of the lands,

and in consideration also of a loan of 200*l.* by B. to A.— 1815.

B. covenants to execute the lease accordingly, subject to March 20, the re-payment of the 200*l.* for which B. has a judgment, 1816.

No lease actually made, but A. remains in possession of his portion upon his equitable title.—B. lends further sums of money to A. and obtains judgments for these sums, and then conveys the lands, and assigns the judgments to C.— C. issues writs of *fi. fa.* on the judgments, and in 1781, procures a sale by the Sheriff of A.'s equitable interest; and on ejectment brought on the demises of the purchaser, and of C., A. is turned out of possession.

RIGHT TO
SUIT IN EQUI-
TY NOT SALE-
ABLE UNDER
FI. FA.—DE-
MORT-
GAGE.

A. in 1782 files the bill in chancery for relief, and execution of a lease to him according to the agreement, but from embarrassment in his circumstances, does not further prosecute the suit till 1801. No steps taken between 1782 and 1801 to dismiss the bill. In 1808 the bill dismissed below.

The decree of dismissal *reversed* by the house of Lords, for 1st, the right to a suit in equity is not a proper subject of sale by the sheriff under a *fi. fa.* and the sale is a nullity.— 2d, the delay in prosecuting the suit is well accounted for, and no steps were taken to dismiss the bill; and, at any rate, the right to the lease does not rest merely on the covenant by the landlord to make it, but is part of the consideration of that conveyance or assignment by which the landlord himself acquired his title.—Therefore the principle of delay does not apply, and A. is still entitled to have his lease executed in terms of the contract; and has his relief in equity, without the necessity of resorting for redress to the Court, out of which the *fi. fa.* issued.

RICHARD Moore, the Appellant's father, filed his bill in chancery, on the 26th April, 1782, against Richard Blake, George Blake, Thomas Martin, Valentine Blake, and George Geale, Defendants, therein named, stating the following facts: That Thomas Duel, late of Ballymagibbon, in the county of Mayo, was, in his life time, possessed of the town and lands of Killesarogh, or Ballymagibbon, and Kilfrehane, or Douogh, containing about 300

Bill filed
1782.

—1815.
March 30,
1816.

RIGHT TO
SUIT IN EQUITY
NOT SALE-
ABLE UNDER
FI. FA.—DE-
LAY.—MORT-
GAGE.

acres of profitable land, under a lease from the see of Tuam, for a term of 21 years, at a small yearly rent, and fine for renewal. In 1761, Duel, on the inter-marriage of his eldest daughter, Mary Duel, with Richard Moore, (the Appellant's father) by marriage articles, duly registered, assigned his interest in the lands to Richard Moore, in consideration of the marriage, and a sum of 300*l.* paid by R. Moore, to Duel's other daughters, &c.; and Moore on his part covenanted to settle on Duel's wife, and on his own intended wife, 30*l.* each, by way of jointures, chargeable on the lands.

1769. Moore
possessed of a
lease of church
lands.

Duel having died in 1769, Moore took possession of the lands, and afterwards contracted debts, and became extremely embarrassed in his circumstances.

Agrees to sell
his interest in
the lands to
D'Arcy.

In consequence of these embarrassments, with which, as was alleged in the bill, John D'Arcy, of Houndswood, in the county of Mayo, was well acquainted, Moore agreed to sell all his interest in the lands or farm (which produced a profit of 800*l.* a year) to D'Arcy, in consideration of D'Arcy's paying off Moore's debts, which amounted to about 800*l.*, and

In considera-
tion of D'Ar-
cy's giving him
back a lease
of half the
lands.

of his, D'Arcy's, making or giving back a lease to Moore of one half of the lands at half the yearly rent and renewal fines, payable to the see of Tuam for the whole, and for the same term under which the whole was held. D'Arcy having afterwards refused to pay more than 575*l.* of the debts, Moore found himself under the necessity of acceding to the terms; and accordingly assigned his interest in the land, upon the above mentioned conditions, to D'Arcy, who however advanced 200*l.* to Moore, by way of loan, to secure the re-payment of which,

And lending
him 200*l.*

Moore gave his bond and warrant of attorney, upon which judgment was entered up.

— 1815.
March 20,
1816.

Immediately after the execution of the last mentioned deed, another deed or instrument in writing was executed by D'Arcy to Moore, bearing date the 6th day of November, 1769; whereby, after reciting the assignment, and that D'Arcy had paid 200*l.* over and above the said 575*l.* for which sum of 200*l.* Moore passed a bond or warrant of attorney, he, D'Arcy, covenanted with Moore: "That in consideration of such assignment to the said D'Arcy, he the said John D'Arcy would, at the request of the said Richard Moore, his heirs and assigns, perfect and execute a lease to the said Richard Moore, subject to the usual clauses between landlord and tenant, of all that part of the said lands then in the occupation of the widow Duel, John Browne, and Richard Moore, on the same footing and tenure that the said John D'Arcy held or should thereafter hold the same under the see of Tuam, and renew the same from time to time, subject nevertheless to the yearly rent of 5*l.* 5*s.* and also to half the fines, fees, and expenses of renewal of the whole concern with the see of Tuam, and also subject to the payment of the said last mentioned sum of 200*l.* and interest thereof to the said Richard Moore, indemnifying and saving harmless him the said John D'Arcy, his heirs and assigns, from all debts, jointures, and incumbrances, affecting or thereafter to affect the said concerns, or any part thereof."

RIGHT TO
SUIT IN EQUITY NOT SALE-
ABLE UNDER
VI. PA.—DE-
LAY.—MORT-
GAGE.

D'Arcy cove-
nants to exe-
cute the lease,
subject to the
payment of
the 200*l.*

It is observable that, in the deed of assignment, the lands of which Moore was to have a lease were

— 1815.
March 20,
1816.

RIGHT TO
SUE IN EQUITY
NOT SALE-
ABLE UNDER
FI. FA.—DE-
LAY.—MORT-
GAGE.

stated as a moiety, while in the deed of covenant they are mentioned as the part in the occupation of the widow Duel and others, which seems to have been the portion called Killesarogh or Ballymagibbon. Of that portion, Moore continued in possession, and D'Arcy took possession of the other moiety as it was called in the bill, or that portion denominated Kilfrahan, or Douogh.

D'Arcy advances further sums to Moore, for which he obtains judgments, and assigns his interest in the lands, and the judgments to Blake.

D'Arcy afterwards advanced two further sums of 40*l.* and 20*l.* to Moore, who gave bonds for them, upon which judgments were entered up, but never executed the lease; and, in 1777, he assigned his interest in the whole lands, and the three bonds and judgments to Richard Blake, who had an estate adjoining to Moore's farm. Richard Blake revived the judgment in his own name, and, without notice

Blake procures Moore's interest to be sold under writs of *fi. fa.*

to Moore, as the bill alleged, caused three writs of *fi. fa.* to issue on the three judgments, directed to the sheriff of Mayo; and procured the same to be delivered to one James Geale, who acted as sub-sheriff to Valentine Blake, the high sheriff, over whom (Geale) Richard Blake, as the bill alleged, had great influence. The bill further stated that Richard Blake having called together two or three of his friends, they repaired to the sessions house, at Ballincobe, in the said county of Mayo; and set up for sale by public cant, without having posted any previous notice thereof, Moore's interest in the moiety, or rather, Ballymagibbon portion, of the lands, though Moore had never obtained any lease from D'Arcy, and consequently had not the legal

Moore's interest purchased by Blake's brother.

title; and that George Blake, the brother of R. Blake, having bid 330*l.*, being about 15*l.* more than

the amount of the executions and costs, and by several hundred pounds less than the real value, was declared the purchaser, and the interest was assigned to him by the sheriff. The bill further stated that an ejectment was brought on the separate demises of R. and G. Blake, and that they threatened to turn Moore out of possession, under colour of the sheriff's sale. And the bill charged that Blake knew before the sale that Moore had only an equitable title, and prayed that the sale and writs might be set aside, and that Blake, being liable to the same equity as D'Arcy, might be compelled to execute a lease to Moore, pursuant to the agreement; that the defendants might be restrained from turning Moore out of possession, and that a reasonable time might be allowed to Moore to pay the demands against him.

— 1815.
March 20,
1816.

RIGHT TO
SUIT IN EQUI-
TY NOT SALE-
ABLE UNDER
FI. FA.—DE-
LAY.—MORT-
GAGE.

Ejectment.

Charge that
Blake had no-
tice of the na-
ture of Moore's
title.

Prayer of the
bill.

The defendants by their answers admitted the material facts in the bill, and stated that they believed the reason for D'Arcy's refusing to execute a lease to Moore was, that Moore had not performed his part of the agreement, by payment of the 200*l.* and his half of the rent and fines; and they denied that George was merely a trustee for Richard Blake; and insisted that, as Moore had no other property for payment of his debts, the sale was valid; and that George Blake, the purchaser, and not Moore, was entitled to the lease under the agreement.

Answers.

Moore, it appeared, was unable, owing to the em- barrassment in his circumstances, to prosecute the suit for several years, and was turned out of possession. At length in January, 1801, he filed his

Delay in pro-
secuting the
suit.

— 1815.
March 20,
1816.

RIGHT TO
SUIT IN EQUI-
TY NOT SALE-
ABLE UNDER
FL. PA.—DE-
LAY.—MORT-
GAGE.

chasers ; and the Respondents were, after they had obtained possession placed in contemplation of a Court of Equity, in the situation and character of mortgagees in possession, or stood in the situation of trustees of the said moiety of the said lands, by virtue of the said articles of agreement and declaration of trust of the 6th of November, 1769, and the notice thereof to the said Richard and George Blake.

2d. Because it was also clearly proved that it was the poverty and imprisonment of the said Richard Moore which prevented him from prosecuting the said cause with diligence, (which inability was caused by the oppressive conduct of the said Defendants, and the fraudulent sale, and the dispossessing of the said Richard Moore as aforesaid, and the adverse and fraudulent answers filed by the said defendants, Richard Blake and George Blake, to the said Richard Moore's original bill,) and as the said original bill never was dismissed, nor the said cause abated, until after the said Richard Blake's appearance to the said amended bill in the year 1801, as herein before-mentioned, same must be deemed a *lis pendens* ; and as it was not laches in the said Richard Moore to have rested on his equitable title, previous to the filing of the original bill, the possession having gone up to that time with the equitable agreement contained in the said article, according to the authority of Lord Redesdale, in *Ormsby v. Crofton*, 2 Schole and Lefroy's Reports, so the pendency of such original bill, according to the same authority, as reported in 1 Schole and Lefroy, 386, had the effect of preserving to the Appellant a right to the same relief, which the said

Richard Moore was entitled to at the time of filing the original bill as aforesaid, and therefore the Appellant should not have been barred from the relief to which the said Richard Moore was entitled at the time of filing the original bill by reason of the delay suffered in prosecuting the suit.

It appeared that the decree below had not been made up, and the judgment was delayed till the defect should be rectified.

RIGHT TO:
SUIT IN EQUITY NOT SALE-
ABLE UNDER
FL. PA.—DE-
LAY.—MORT-
GAGE.
Judgment de-
layed till de-
cree made up
below.

Lord Eldon (C.) In the Appellant's case, and at the bar here, it was represented that the latter decree in this case proceeded on the ground of the delay in prosecuting the suit. And the question now is, whether this or the former decree is the right one; and whether, if the last decree should not be sustained, the relief under Lord Chancellor Ponsoby's decree was exactly that which ought to be given. It is unnecessary to state the circumstances of this case prior to 1769, when Richard Moore, the Appellant's father, became possessed of this property. It appeared that he was in very embarrassed circumstances; and for the reasons, and upon the conditions stated in the case, conveyed his interest in these lands to one John D'Arcy, who thereupon entered into possession of a portion of the lands, known by the name of Kilfrahane, or Douogh. Soon after this the instrument of agreement, of which I have now seen the original, was executed between the parties; and that instrument, which is dated 6th Nov. 1769, after reciting this last deed, and that John D'Arcy had paid the 200*l.* over and above the 575*l.*, for which sum of 200*l.* Moore had

March 30,
1816.
Judgment.

March 30,
1816.

RIGHT TO
SUIT IN EQUI-
TY NOT SALE-
ABLE UNDER
FI. FA.—DE-
LAY.—MORT-
GAGE.

D'Arcy a
mortgagee
upon Moore's
interest for
this 200*l*.

given his bond and warrant of attorney, (upon which judgment was afterwards entered up), states, that D'Arcy covenanted with Moore that, in consideration of the assignment, he would at the request of Moore, his heirs and assigns, perfect and execute a lease to Moore, &c. subject to the usual clauses between landlord and tenant, of all that part of the lands in the occupation of, &c. on the same footing and tenure that the said D'Arcy held, or should thereafter hold the same under the See of Tuam, and renew the same from time to time; "subject nevertheless to the yearly rent of 5*l*. 5*s*., and also "subject to half the fines, fees, and expenses of renewal of the whole concern with the See of Tuam, "and also"—it was for this passage that I was anxious to see the original—"and also subject to "the payment of the said last mentioned sum of "200*l*. with interest thereof, to the said Richard "Moore, indemnifying and saving harmless him, "the said John D'Arcy, his heirs and assigns, from "all debts, jointures, incumbrances, &c."

I take the liberty of addressing your Lordships first on this case, which involves considerations better known to those acquainted with the administration of justice in Ireland, in order to have those doubts which, when viewing this as an Irish case, exist in my mind as to points, which I take to be clear law, both at law and in equity in England. But if the nature of this transaction is to be understood, as I conceive it would be understood here, it made Richard Moore a co-lessee with D'Arcy to the amount of a moiety of the lands—in equity I mean—and also placed him under the obligation to pay

half the rent and fees of renewal for the whole of the lands : but that, whilst it constituted this relation of co-lessees, it also created another relation, that of mortgagor and mortgagee between Moore and D'Arcy, and D'Arcy was under an obligation to make this lease of a part of the lands to Moore, standing, at the same time in another relation with respect to Moore as his mortgagee, to the extent of this 200*l.* which was a charge on the lease which he so agreed to make.

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1816.

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SUIT IN EQUI-
TY NOT SALE-
ABLE UNDER
FI. FA.—DE-
LAY.—MORT-
GAGE.

Relations in
which Moore
and D'Arcy
stood with re-
spect to each
other.—Co-
lessees.—

Mortgagor
and mortga-
gee.

Then the cases represent that D'Arcy having taken possession of half the lands, and Moore remaining in possession of the other half or portion, Moore became further indebted to D'Arcy in two sums of 40*l.* and 20*l.*, for which he gave his bond and warrant of attorney, to enter up judgment, which was accordingly entered up. D'Arcy, without having made the lease to Moore, assigned his interest in the lands to Richard Blake, together with the bonds and judgments for the 200*l.*, 40*l.*, and 20*l.*; and then Blake, in 1781, caused three writs of *fi. fa.* to be issued upon the judgments; and under these, as I understand it, Moore's interest was put up to sale, and purchased by George Blake, the brother of Richard Blake, and a conveyance was accordingly executed upon which Blake caused an ejectment to be brought, which, if not upon that, he might have caused to be brought on the legal estate which was in himself.

Then a bill was filed to set aside the sale, to compel the execution of the lease to Moore, &c. This bill, as I understand it, was filed in 1782; and, if Lord Manners's opinion, that no relief could be

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1816.

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TY NOT SALE-
ABLE UNDER
VI. FA.—DE-
LAY.—MORT-
GAGE.

The landlord would have an undue advantage if a sale of this kind were permitted to stand.

The sale a nullity, and relief, it seems, in such cases may be had in Equity without application to the Court out of which the *fi. fa.* issued.

given, rested on the ground of delay, that is a ground which does not import an opinion that, if the suit had been prosecuted with due diligence, relief ought not to be given. I mention that, because it was stated—a statement so new to me that I did not know how to deal with it—that it was the usage in Ireland for sheriffs, under writs of *fi. fa.* to sell such interests as this, and then it was further argued that, even if the Sheriff had no right to sell it, redress ought to be sought by application to the court of law from which the *fi. fa.* issued, and not by application to a Court of Equity. It seems to me, that neither of the Judges below adopted that idea, and when we come to consider what this is, we see the more reason to question it. If A. B. makes a lease to C. D. and A. B. afterwards becomes a creditor of C. D. and obtains judgment and sells the interest, he who buys is actually in. But if the matter rests merely in agreement, consider what an advantage the landlord has in this way by being a creditor; for when he becomes the purchaser of the interest he gets the estate itself, whereas another would only get a right to a suit in equity. And this too is not a case where a landlord merely lets a lease, but where he contracts also in such a way as to make himself a mortgagee or incumbrancer on the lease which he was to grant. And the interest is such that, if the landlord were not a creditor, the equity of redemption could not be foreclosed without a suit in equity; and that interest is not the subject of a sale at law, and the transaction of the sale is therefore a nullity from the beginning to the end.

Then we are to consider whether there is any

thing to bar the relief upon the authority of those cases—not of the cases which justify a dismissal on the ground of not commencing a suit in due time—but of those cases which justify a dismissal on the ground that, though begun in due time, it has not been prosecuted with due diligence; and I do not think the present case falls within that principle. The equity of redemption was never foreclosed, and they might at any period have moved to dismiss the bill. I cannot therefore understand the ground upon which the not prosecuting the suit with due diligence has been in this case considered as a bar to the relief. There never was any motion to dismiss the bill for want of prosecution; and the case does not appear to fall within the principle upon which length of time is a bar.

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TY NOT SALE-
ABLE UNDER
FI. FA.—DE-
LAY.—MORT-
GAGE.

Question of
delay.

The delay in
this case no
bar to the re-
lief.

But if relief ought to be given, I doubt whether Lord Chancellor Ponsonby's decree has not gone too far; for, though the length of time during which the suit has been depending is no bar to the relief, permanent improvements may have been made, and other alterations may have taken place, which ought to be provided for in the decree. In these respects there are difficulties to a certain extent; but if, after hearing the noble Lord (*Redesdale*), it should appear that he concurs in my view of the case, the minor matters may be postponed till another day. If I had stood alone, it would have been my duty to give the best opinion on the case that I could; but I am glad that we have the assistance of the noble Lord, who is so much better acquainted with these Irish proceedings, and I hope he will favour us with his opinion; intimating,

Lord Chan-
cellor Pon-
sonby's decree
in 1801, right
in granting
the relief, but
defective in
some points.

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however, that it appears to me that the latter decree cannot stand at all, and that the former cannot stand in its full extent.

Lord Redesdale. I was not present when this case was argued; but it appears that the question relates to a property held by Moore, under lease renewable for ever, from the See of Tuam, subject to the provisions made upon Moore's marriage. The lands, and this ought to be attended to, consisted of two portions, each having a distinct denomination; the one, Kilfrehane, or Douogh; the other, Killesarogh, or Ballymagibbon. Lord Chancellor Ponsonby's decree was inaccurate in one point, as it proceeds on the idea that a precise moiety of the whole was what was claimed; whereas the part or portion called Killesarogh, or Ballymagibbon, was that to which the bill applied. Moore was in embarrassed circumstances, and entered into an agreement with D'Arcy, to dispose to the latter of his interest in the whole lands; but with a condition, that D'Arcy would execute to him a lease of that part called Ballymagibbon, he (Moore) paying half the rent and fines of renewal. I suppose this was generally understood to be a moiety of the whole; but it is stated that Kilfrehane was more valuable. A conveyance was accordingly executed, by which Moore, in consideration of D'Arcy's taking upon him to discharge 575*l.* of Moore's debts, and advancing him 200*l.* more on his bond, and of his executing a lease as aforesaid, transferred his interest in the whole to D'Arcy; and an instrument of agreement, dated 6th November 1769, was at the same time exe-

cuted, by which D'Arcy agreed to execute a lease of March 20, 1816. that part called Ballymagibbon, to Moore, subject to the payment of half the rent and fines, and to the payment of the 200*l.*, &c. The effect of this transaction then appears to be this, that the contract on the part of D'Arcy to execute this lease, was part of the consideration for which Moore disposed of his interest in the whole. He parted with the whole, subject to this contract, and to the advancing of 200*l.*; and the lease to be executed was again made subject to the payment of this 200*l.* Then Moore was to indemnify D'Arcy against the annuities, and other incumbrances on the whole.

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TY NOT SALE-
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LAY.—MORT-
GAGE.

Under these circumstances, it seems to me that this was not simply a contract for a lease, but that the execution of the lease was part of the consideration of the sale of the whole interest; and that D'Arcy could not refuse performance, and yet retain the property. The ground of delay then does not apply to this, as it was not a mere contract of lease between landlord and tenant, but a part of the transaction, which gave D'Arcy the character of landlord. Moore possessed without a lease, and D'Arcy had this security for his 200*l.*, in consequence of the contract not being carried into execution. D'Arcy, in 1777, assigned the whole interest in the lands, and the bonds, and judgments, to Blake; and in 1781, four years after, writs of *fi. fa.* were issued on the judgments, and a sale of Moore's interest took place. Now Moore was in possession thirteen years under this contract; both rested upon it, and Moore being in possession, Blake must necessarily have notice that he had

Nature of the
transaction.

From the na-
ture of the
original trans-
action D'Arcy
could not re-
fuse perform-
ance and yet
retain the pro-
perty, so that
the ground of
delay was out
of the ques-
tion.

Moore being
in possession,
Blake must be
presumed to
have had no-
tice of his
title.

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NOT SALE-
ABLE UNDER
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GAGE.

Blake might
have filed a
bill to fore-
close.

Mortgagors
with judg-
ments against
them could
never sell their
equities of re-
demption, if
such sales as
this could be
sustained.

Question of
delay.

Delay.

some title, and it is reasonable to suppose that he inquired what that title was. If Blake had been desirous to foreclose for non-payment of the 200*l.*, and had, as he might have done under the Irish statute, tacked the judgments to the mortgage, he might have filed a bill for that purpose, and then Moore would have had a limited time appointed, within which he must pay, or, if not, he would be foreclosed. But, instead of that, Blake takes a different course, which cannot be sustained, that is, he resorts to the sale of a right to a suit in equity; and it would be of dangerous consequence if such a transaction could be sustained, for it would then be impossible for mortgagors, who had judgments against them, to sell the equity of redemption of the mortgaged property.

Then the only question is as to the delay. The bill was filed the moment Blake executed this contrivance, and therefore there was no undue delay in filing the bill, as it was filed before Moore was turned out of possession under the ejectment, and before Blake got possession. There was delay in prosecuting the suit, but then Blake might have moved to dismiss the bill for want of prosecution. He suffered the matter to rest however until Moore proceeded with it and obtained a decree, from which it appears that the Lord Chancellor acted upon somewhat of a mistaken notion of the nature of the case. He decrees a lease of a moiety to be executed; but it was not a moiety, but a distinct portion. When the cause came on for a rehearing Lord Manners dismissed the bill, and it was stated that the ground of that decision was the delay in

prosecuting the suit. If there was no other ground, ^{March 20, 1816.} that ground did not apply. Whether that was the ground or not I do not know, but I have heard of no other, except the alleged practice in Ireland of selling interests of this nature under writs of *fi. fa.*, and even that is stated to have been the practice only in 1781, for I do not understand it to be said that it is the practice now.

The judgment must be somewhat special, as allowance must be made to Blake for improvements, and the first decree has not provided for the application of the rents to the reduction of the fines and rent to the Archbishop, after which they must be applied to the reduction of the principal and interest of the mortgage money. This requires further consideration, but the contract must be held to be still binding.

On the 26th of March, 1816, the formal judgment was delivered in by Lord Redesdale, ^{March 26, 1816.} reversing the decree of 1808, and affirming that of 1801 ^{Formal judgment.} with alterations and additions as above; *Lord Redesdale* stating (*Lord Eldon* (C.) concurring) that the costs were calculated on the principle that the landlord might refuse to execute the lease till paid his debt, interest, and costs.

Agent for Appellant, WATKINS.

Agent for Respondents, WINDUS.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MARNELL and another—*Appellants*.BLAKE and another—*Respondents*.

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April 1, 8,
1816.

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NUITY.

IN this case a tenant for life, having a power to raise a sum of money, granted an annuity charged on the settled estates till a certain sum should be paid off, without, in the annuity deed, referring to the power. Held that this, under the particular circumstances of the case, was a good, though an informal, execution of the power.

The peculiar circumstances were chiefly, that the settlement gave no directions as to the mode of execution; and that it contained a prohibition against sale or mortgage, which, though it was understood as only a prohibition against sale or mortgage so as to defeat the provisions of the settlement, might have had the effect of inducing the tenant for life to have recourse to the mode of annuity.

Lord Eldon (C.) (*Lord Redesdale* concurring) expressly guarding the judgment against being understood as a decision that *in all cases*, where tenant for life had such a power, the grant of an annuity, without reference to the power, would be a good execution.

Sept. 18, 1779.
Indenture of
settlement
made on the
marriage of
James Mar-
nell and Ho-
pora his wife.

BY indenture bearing date the 18th of September, 1779, and made between Edmond Marnell, then of Cregan, in the county of Galway, Esquire, and Elinor Marnell his wife, and James Marnell his eldest son and heir, (all since deceased,) of the first part, James Henry Burke, Edmond O'Flynn, Thomas Kelly, and Ulick Burke, Esquires, of the second part; and Honora. Morgan, (since de-

ceased,) then the widow and executrix of Jeffery Morgan, deceased, of the third part; after reciting (amongst other things) that a marriage was intended

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to be had between the said James Marnell, and Honora Morgan, and that the said Edmond Marnell then stood seized in fee simple, of the following lands, tenements, and hereditaments, that is to say,

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Moher, Grallaghduff and Kiltogher, containing 163 acres, Stafford survey, more or less, (which denominations with their appurtenances were reputed, known, and taken as part and parcel of the demesne lands of Cregan Corlack, otherwise Knock-vigue, containing fifty-three acres, like survey, more or less,) Kilcroan Temple, otherwise Ballyglass, containing seventy-three acres, like survey, Gilkagh, containing sixty-four acres of land, Irish plantation measure, more or less, the lands of Carrawin and Carraclogher, otherwise Kilcooley, containing 144 acres, Stafford survey; the said Edmond Marnell, for the consideration therein-mentioned, covenanted

and agreed with the said James Henry Burke, and Edmond O'Flynn, that they should stand seized of an estate of inheritance, in fee simple, in possession of and in all the said recited lands and hereditaments, under and subject to the provisoes and agreements therein declared, of and concerning the same,

Covenant that
the trustees
should stand
seized of an es-
tate of inherit-
ance in fee
simple.

(that is to say,) to the use of the said James Marnell, during the term of his natural life, without impeachment of waste, and from and after his decease, to the use, intent and purpose, that the said Honora his intended wife, should yearly during the term of her natural life, out of the said lands and tenements, have and receive one clear third part of

To the use of
James Marnell
for life.

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NUITY.

Remainder to
his first and
other sons in
special tale
male.

Remainder to
the Appellant,
Richard Mar-
nell the elder,
in tail male.

said lands, or any other estate or lands that her said intended husband should either purchase or acquire in any manner whatsoever, or whereof he should die seized; and from and after the decease of the said James Marnell, then as to all the said lands and hereditaments, to the use of the first, and every other son of the said James Marnell, on the body of the said Honora Morgan to be begotten, in tail male, charged and chargeable with the judgment debts which then affected said lands, and for default of such issue, then to the Appellant Richard Marnell, the elder second son of the said Edmond Marnell, for and during the term of his natural life, and to the heirs male of his body lawfully to be begotten, with several remainders over; and it was further agreed by, and between all the parties to said indenture, that a sum of 1,300*l.* sterling, intended as a provision for the younger children of the said Edmond Marnell, was to be an absolute debt and incumbrance, affecting the said estate and lands until paid off and discharged, and to be at the absolute disposal of the said Edmond Marnell, and payable in manner as thereafter expressed. And the said Edmond Marnell by said indenture covenanted and agreed with said James Marnell, and the said trustees, that he would apply the said Honora's marriage portion of 1,600*l.* sterling therein mentioned, (which he was to receive,) in the discharge and payment of the judgment debts affecting said lands, and in discharging and paying off the said sum of 1,300*l.* sterling, intended for the said younger children of said Edmond Marnell; and an annuity of 100 guineas, was thereby made

payable to the said Edmond Marnell, during the ^{May, 1815;} term of his natural life; and the said James Mar- ^{April 1, 8,} nell by said indenture, agreed to pay an annuity of ^{1816.} 50*l.* a year during her natural life, to Elinor Marnell, ^{POWER.—} the wife of said Edmond Marnell, in case she ^{INFORMAL} should survive the said Edmond; ^{EXDOUTION} and after reciting ^{AIDED.—AN-} that it might be convenient and necessary for the ^{NUITY.} said James Marnell to have the power of raising ^{Power to} a sum of money, it was expressed to be the true ^{James Mar-} intent and meaning of all the said parties, notwith- ^{nell to raise} standing any thing therein contained to the con- ^{1,500*l.* by sale} trary, that it should be lawful for the said James ^{or mortgage.} Marnell, at any time thereafter that he should think proper, to raise or borrow any sum or sums of money, not exceeding 1,500*l.* sterling, and that without the consent, approbation, or control of the said trustees, or the survivoor or survivors of them, or their, or either of their executors or administrators; and it was by the said indenture agreed that no part of the sum of 1,300*l.*, intended for the younger children of the said Edmond Marnell, should bear interest; and certain portions were thereby provided for the younger children of the said James Marnell; and it was by said indenture ^{Covenant,} further covenanted, that said James Marnell, or ^{that James} the Appellant Richard Marnell, should not mort- ^{Marnell, or} gage or sell any part of the said estate or lands ^{Richard the} during their lives, any thing therein contained to ^{Appellant,} the contrary notwithstanding. ^{should not}

This was the statement given in the printed cases of the indenture of settlement, but it appeared that in the original, Edmond Marnell was made to agree with the trustees that they and their executors ^{Difference be-} ^{tween the set-} ^{tlement in the} ^{original, and} ^{as stated in the} ^{printed cases.}

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should stand seized of an estate of *inheritance*, in *fee simple*, for and during *a term of ninety-nine years*, and afterwards that the trustees and *their heirs* should stand seized to the uses of the settlement. It is observable also that, while the instrument gives the power to raise the 1,500*l.*, it contains a prohibition to sell or mortgage.

Conveyance in
fee to James
Marnell, who,
under the pre-
vious provi-
sions of the
settlement,
had been
made merely
tenant for life.

The deed was registered on the 3d February, 1780. The marriage took place, and pursuant to a covenant in the settlement, a fine of the lands was levied as of Hilary Term 1780, by Edmond Marnell the father, and Eleanor his wife to James Marnell and his heirs. And by indenture of release 25th March, 1780, reciting the settlement and fine, Edmond conveyed the lands to James Marnell and his heirs.

Bonds and
Judgments.

It appeared that Edmond Marnell, the father, was indebted to William Ousley as executor of Sarah Ousley, by bond executed by E. Marnell to Sarah Ousley dated 21st June, 1762, for the principal sum of 200*l.* payable with interest in May following. James Marnell the son, was also indebted to Ousley in his own right in a sum of 60*l.*, to secure the payment of which Edmond and James Marnell gave their joint and several bond and warrant of attorney dated 20th March, 1776, upon which separate judgments were entered up. James Marnell was further indebted to Ousley in a sum of 177*l.* 5*s.*, for which he gave his bond, &c. dated 10th February, 1787, and also in a sum of 162*l.* 14*s.*, for which he gave his bond dated 19th September, 1792. On all these bonds, judgments were entered up. The several sums stated made up the principal sum of 599*l.* 19*s.*

Ousley being desirous of calling in the amount of ^{May, 1815 ;} his securities, an indenture, called a deed of rent ^{April 1, 8,} charge, dated 6th June, 1794, was made between ^{1816.} James Marnell and Ousley, by which, after reciting that Marnell was indebted to Ousley by bonds and judgments, in several sums of money amounting in the whole to 744*l.* 2*s.*, it was witnessed that Marnell, in consideration of that sum, gave and granted to Ousley, an annuity or yearly rent charge of 150*l.* payable out of, and chargeable upon the lands of Bally-glass and Gilkagh, being *part* only of the lands mentioned in the settlement, to have and receive the said annuity, &c. until the said sum of 744*l.* 2*s.* and the interest and costs then due, or thereafter to grow due, should be fully paid off and discharged, and *no longer*, with power of distress and entry in case the annuity should be in arrear. And it was also agreed that, in case of default of payment at the stated periods, or that the said Ousley, his executors, administrators or assigns, should meet with any legal interruption in the payment thereof, then Ousley, his executors, &c. should be at liberty to resort to the said judgments and proceed thereon, &c. in as full and ample a manner as if the indenture had never been made.

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NUITY.
Annuity deed
6th June,
1794, charg-
ing only part
of the lands in
the settlement.

Ousley, in case
he could not
procure pay-
ment by the
annuity, to be
at liberty to
resort to his
judgments.

When the first *gale*, as it was called, of the annuity became due, Ousley was prevented from obtaining payment by the interference of other creditors, and, resorting to his judgments, he in 1797, procured a grant in *custodiam*, as it is called, of The *custodiam* proceeding was represented in the Appellant's case as proceeding part of the estates. But before any rents were paid him, James Marnell, in 1798, died without issue (Edmond Marnell had died in 1795), and his brother,

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NUITY.

on the judg-
ment for 1774,
which was
that of James
Marnell.

Bill filed 1801
to have the an-
nuity deed de-
clared an ex-
ecution of the
power.

Prayer of the
bill.

Richard Marnell, became entitled to the lands under the provisions of the settlement, and Ousley lost the benefit of his *custodiam* grant.

In March, 1797, Ousley had assigned the annuity and bonds and judgments to Henry Blake, who had married his daughter, to secure 400*l.* as a portion for the daughter.

In M. Term, 1801, Blake and Ousley filed their bill in behalf of themselves and the other creditors of James Marnell, against Richard Marnell and his son, and the Rt. Hon. Thomas Kelly the only surviving trustee under the settlement of 1779, stating the facts abovementioned, and praying an account on foot of the bonds and judgments; and that what should be found due might be decreed a charge on the lands comprised in the settlement; and that James Marnell might be declared to have, by the annuity deed of 1794, well executed the power to charge the lands; or that the defective execution might be aided by the Court, and that Richard Marnell might be decreed to pay what should appear due by a short day, or that a competent part of the lands might be sold for that purpose, &c.; and that such other creditors of James Marnell as should come in and contribute to the expense of the suit might be paid their debts, &c.

Answer 1809.

Richard Marnell in 1809, put in his answer, and insisted that the grant of the annuity was never meant as an execution of the power, but a mode of paying the debt by instalments out of James Marnell's life-interest; and he submitted that there was no fair consideration for the annuity deed, and that by the statement in the bill itself, only 599*l.* 19*s.*

appeared to have been due to Ousley. The son, an infant, submitted his interest to the Court, and Kelly put in no answer.

After examination of witnesses relative to the intent to execute the power, and some other proceedings not material to be stated, the cause came on for hearing; when the Court, without taking any notice of that part of the bill which related to the other creditors of J. Marnell, on the 25th November, 1811, decreed an account on the foot of the 744*l.* 2*s.*, the consideration money in the annuity deed; and that whatever should appear due was well charged on the lands by the said deed, and that Richard Marnell should pay the sum due in three months, or that the same should be raised by sale or mortgage of a competent part of the lands; and that each party should abide his own costs.

From this decree, Blake, and Mary Ann Ousley, the widow and representative of William Ousley, who had died in the course of the proceedings, appealed.

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INFORMAL
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AIDED.—AN-
NUITY.
No notice was
taken in the
judgment of
this extrinsic
testimony.
Decree 1811.
That the
power was
well executed
by the annuity
deed.

Appeal.

It was observed in argument for the Appellants that it was difficult to conceive how the money was to be raised under the power, except by sale or mortgage, and yet both were forbidden. The deed which was said to be an execution of the power contained no reference to it, and the decree made the sum a charge on all the estates in the settlement, though the deed itself had only charged part of those estates. The question was, whether this annuity deed was a good execution of the power. If there was an execution of the power in favour of a volunteer, the Court would give the creditors the

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EXECUTION
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benefit of it; but where, as in this case, there was no attempt to execute the power at all, the Court would not execute, even in favour of creditors: *Holmes v. Coghill*, 7 Ves. 499.—12 Ves. 206. Ever since Sir Edward Clere's case, 6 Rep. 17. 6., where one having a power, makes a deed which cannot operate except by the power, then he shall be presumed to have intended to execute the power, though it is not referred to. But it is otherwise where he has an interest on which the deed may operate, *Cor v. Chamberlain*, 4 Ves. Junr. 631. A total omission to execute a power could not be supplied in equity, though an informality in the execution would be aided, where there was a meritorious consideration. But the question here was whether he meant to execute the power at all. The intention must be clear, and if the person charging the land has, besides the power, an interest in respect of which he could charge the land, independent of the power, then, unless he mentions the power, the act shall be applied to the interest, and not to the power. And here the probability is that he meant only to charge his life interest without reference to the inheritance. He did not pretend to bind any but himself. In the reasons in the printed case, it was further objected that though the suit was in behalf of the other creditors of James Marnell, as well as the Respondents, the decree proceeded entirely on the ground of the annuity deed of 1794—that the deed did not charge all, but only part of the lands comprised in the settlement; and that at any rate it was not intended to be an execution of the power, but the object of it was to give Ousley a right to

receive his debt by instalments out of part of the lands during the life of James Marnell, and thereby to suspend proceedings on the judgments against J. Marnell, until default in payment of the rent charge—that if the parol evidence were admitted, it would show that the deed had been obtained by undue means, and that the Court ought not, on the mere recital of the deed, to have assumed that 744*l.* were due, but ought to have directed an inquiry.

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1816.

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The reasons in support of the decree in the case of the Respondents were these :

1st, The said indenture of the 6th day of June, 1794, ought to be deemed a part execution of the power of charging 1,500*l.* given to the said James by the marriage articles of the 18th of September, 1779. By these Articles James Marnell had an estate for life, and had also a power to charge the lands of which he was tenant for life, with any sum not exceeding 1,500*l.*; it is a principle that where a man hath both a power and interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power, though the power be not referred to by the instrument creating such estate. By the deed of 1794, James Marnell granted the rent charge of 150*l.* per annum, till the debt thereby secured should be paid; therefore, as the deed of rent charge, if it were supplied out of his interest, would expire with his life, it ought, on the aforesaid established principle, to operate as an execution of his power.

2d, Because the evidence of the witnesses examined on the part of the Appellants, so far as it

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went to prove that the said James Marnell did not intend, by the deed of the 6th June, 1794, to execute his charging power, was inadmissible (parol evidence being inadmissible to control the legal operation of the instrument, or to explain the intention of the person executing it); and the Respondents submit, that the decree from which the Appellants have appealed would have been more consonant to justice and equity, if it had given costs to the Respondents, as well as satisfaction of the debts so justly due to them.

*Sir S. Romilly and Mr. Hart for Appellants;
Mr. Leach and Mr. Drowdeswell for Respondents.*

April 1, 1816.

Lord Eldon (C.) 'I propose at present merely to state what this case is; and here I must observe that in this, as in other Irish cases, one cannot trust a single word they put in print. The indenture of settlement, as stated in the cases, is this—(states the settlement of 18th September, 1779, from the cases as above). In looking at the original deed, however, I find it to be—I do not very well know what—not a legal conveyance, but merely an equitable contract. The covenant is that the trustees and their *executors* shall stand seized of an estate of inheritance in fee simple, for and during a term of 99 years, and afterwards there is a proviso that the trustees and *their heirs* shall stand seized to the uses. And as to this 1,500*l.*, one cannot very well see how James Marnell was to raise it. If we were to indulge in conjecture, one would think that it must be by sale or mortgage. But then a proviso was

The deed of settlement not a legal conveyance, but merely an equitable contract.

inserted that James and Richard Marnell should not April 1, 1816.
 sell or mortgage *during their lives*. So that they
 had a power to raise 1,500*l.* by mortgage or sale, but could not sell or mortgage till they were dead. It is impossible that such an instrument as this can have any effect as a legal conveyance. Equity would perhaps, for the benefit of children, and so forth, make something out of it, so as to enable him to charge the estate by sale or mortgage.

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Now the principle is that, if the tenant for life so charges the estate, he keeps down the interest, and those entitled to the inheritance are to pay the principal; and it is clear that where one charges under an authority, if the charge cannot be made good out of his interest, it is good by the authority. But then it must appear on the face of the instrument that he meant to execute the power. Now this is a deed of rent charge—so christened on the back of it—by which Marnell gave and granted to William Ousley, an annuity or rent-charge of 150*l.* sterling, charged upon all that and those the town and lands of Ballyglass and Gilhagh—not affecting to charge the whole, observe—situate, lying, and being, in the half barony of Ballymoe, and county of Galway, &c. &c. And then there is an agreement, Ousley being a judgment creditor before the execution of this instrument, that in case the annuity should be in arrear, Ousley, &c. should be at liberty to resort to the judgments, and proceed thereon, in as full and ample a manner as if this indenture had not been entered into.

Principle.
 The tenant for life keeps down the interest. The principal is a charge on the inheritance.

Annuity deed, 1794.

Alternative to resort to the judgments.

Now, suppose we can get over the difficulties which may arise from this curious instrument of

April 1, 1816. settlement, the first question will be whether Marnell, having a power to charge the estates with a sum of 1,500*l.* which would make him liable to pay the interest, the person entitled to the inheritance having to pay the principal—whether, if this 1,500*l.* was not charged upon all the estates by way of mortgage or sale, but an annuity was granted of 150*l.* charged on part only of the estates, until a sum of 744*l.* should be paid off—that could be taken as a good execution of the power, and whether, it having happened that the person who granted the annuity died when only one gale, as they called it, had been paid, the person who had dealt with him for this annuity can now turn round and say, “this is a charge on the whole estate, and the 744*l.* ought to be raised out of it;” and whether, Marnell having a power to raise a sum of 1,500*l.* by mortgage or sale, out of the whole estates—that is, having power to do one thing, and having in fact done another, it is to be held that he meant to do that which he had a power to do.

It further appears that he resorts under the last clause in the indenture of 1794, to the judgments and *custodiam*, as they call it; and then the next question is, supposing this were a good execution of the power, whether, as he has taken advantage of the alternative in the deed, he is not to be considered as having waived his particular remedy by execution of the power.

In the Respondent's printed case, it was stated that Lord Redesdale had been

Another point is that, while we are obliged to examine every instrument in these Irish cases, whether printed or not, we are not always accurately informed from the cases of what passed below. This was a

bill filed to declare this a good execution of the power, and the cause came before two Lord Chancellors, one of whom is here. The defendant demurred to the bill, and one of the cases informs us that Lord Redesdale being of opinion that the deed of rent charge was a good execution of the power, overruled the demurrer. Lord Redesdale is now present, and perhaps it may appear that he gave no opinion at all on the point. Under these circumstances, however, Lord Manners thought this was a good execution of the power. Whether he saw the original settlement or not, I do not know. But your Lordships will have now to consider, 1st, What is the effect of this first instrument; 2d, What is the effect of the next instrument, under the proceedings had upon it by *custodiam* and otherwise. 3d, Whether, if this was a power to raise by sale or mortgage, and the proceeding upon the judgments was no waiver, whether considering the nature of the annuity transaction, this is, or is not, a good execution of the power; and, if we can find our way through these difficulties to the last question, I do say it is as difficult a question as almost any I ever met with.

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clearly of opinion, when the cause came before him on demurrer below, that the power was well executed.

The question very difficult.

Lord Redesdale. The object of the bill in this case was to have it declared that a sum of 744*l.* was well charged on the lands by virtue of a power given to James Marnell by his marriage settlement. The decree is confined to the claim of Blake and Ousley, and does not extend to the whole creditors of J. Marnell, according to the prayer of the bill—and it is appealed from only by Richard Marnell, and his

April 8, 1816.
Judgment.

Object of the bill.

April 8, 1816. son, and therefore we have only to consider that part of the case.

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EXECUTION
AIDED. — AN-
NUITY.
Settlement to
be considered
merely as an
equitable con-
tract.

This instrument of marriage settlement is so extraordinary, so informal, so inconsistent, such a jumble of contract and conveyance, that it is impossible it can operate as legal conveyance, and can be considered only as an equitable contract of settlement of this description.—Edmond Marnell covenants to convey the lands to trustees to the use of James Marnell for life; with remainder to his first and other sons in tail male, reserving certain annuities on the estates; and, in default of such issue, remainder to the Appellant Richard Marnell and his issue, in strict settlement. There was a power to James Marnell to raise a sum of 1,500*l.* out of the estates, and the settlement was in consideration of a sum of money, the property of the intended wife; which has been received by Richard; and one object of the settlement was the application of this money in paying off incumbrances.

Whether the
annuity deed
was an execu-
tion of the
power.

The important question is, whether the sum of 744*l.*, which was the consideration in the deed of 1794, was effectually charged by James Marnell on the estates; the manner being his granting an annuity, not out of the whole, but out of a part of these estates to Ousley, until he should be paid that sum. There was in that deed a provision that, if Ousley should not be able to get payment out of the rents in this manner, he should be at liberty to have recourse to his judgments, one of which was a judgment of Edmond Marnell. The others were the judgments of James Marnell, which would attach on his interest. In this settlement there was a pro-

vision in its form absolute, by which James takes the absolute property in fee. But as the settlement was registered, James, though he had the legal estate, would be bound to make a conveyance according to the settlement. The decision of the Court of

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Chancery was, that it should be referred to Stewart King, Esq. the Master in the cause, to inquire and report, whether any and what sums remained due to the Respondents for principal and interest and costs on foot of the sum of 744*l.* 2*s.* being the consideration money mentioned in the deed of the 6th day of June, 1794, in the pleadings mentioned. And it was further ordered, adjudged, and decreed, that whatever sum might remain due on foot of the said 744*l.* 2*s.* should be, and the same was thereby declared to be well charged on the lands and premises in the pleadings mentioned by virtue of the said deed of the 6th day of June, 1794. And it was further ordered that the Appellant Richard Marpell the elder should in three calendar months after the confirmation of the Master's report pay unto the Respondents the sum which should be reported due to them, with interest from the confirmation of the Master's report; and in default of payment thereof it was further decreed, that the same should be raised by sale or mortgage of a competent part of the lands in the pleadings mentioned, and that in such case all proper parties should join in the necessary deeds to be executed on such sale or mortgage. And it was further ordered, that each party, plaintiffs and defendants, should abide their own costs in the cause.

Decree 1811.

The decree therefore has determined that the

April 8, 1816. 774l. was well charged on the estates. Ousley having been unable to avail himself of his annuity, in consequence of the interference of the other judgment creditors of James; and he having a judgment of Edmond which would take place against the judgments of James's creditors, he proceeded by *custodiam*, and endeavoured to get possession under it. This is a proceeding by which the debtor is outlawed, and the king gets the lands, and grants them to the creditor to hold till he is paid his debt out of the rents. But James Marnell died soon after, and there was an end of that proceeding, as the death of the outlaw puts an end to the transaction, and to the grant of the crown.

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The statement in the Appellant's printed case was, that the proceeding was on the 177l., which was a judgment against James Marnell.

Nature of a *custodiam*.

Then it was objected that this was not an appointment in pursuance of the power; and it was contended that the way in which the land ought to be charged was by sale or mortgage, and not in the form of an annual revenue, which must have the effect of charging the immediate enjoyment, whereas the 1500l. was meant to be a charge on the inheritance.

Informal execution of a power aided and reformed in equity.

Lady Coventry's case, Fran. Max. 73.—2 P. Wms. 222, &c.
Lady Clifford v. Earl of Burlington, 2 Vern. 379.

That this was an informal execution of the power there can be no doubt; but where there is an attempt to execute a power, and for valuable consideration, the Courts have considered that the instrument is to be reformed, so as to be an execution in a manner he had a right to execute. Such was the principle of decision in Lady Coventry's case, which was founded on a variety of cases which had been before decided: such as Lady Clifford's case, decided in 1700 by Lord Keeper Wright, where tenant for life, with a power to

make a jointure of 1000*l.* per annum, covenanted April 8, 1816. to make such a jointure on his wife, and afterwards settled lands accordingly, said to be of 1000*l.* value; but proved to be worth only 600*l.* per annum. Upon bill by the widow, the Court directed the 600*l.* to be made up 1000*l.* by the issue in tail.

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There are several other cases of that kind, from which it is clear that, where the intention to execute appears, and the property is charged, it shall be taken to be an effectual act to the extent of the power. Now, in this case, the deed is defective only in the *manner* of raising the money. It has no reference to the life of J. Marnell; but only to the time when the money was to be raised. It was an annuity granted out of the lands till the sum of 744*l.* should be paid off; and, consequently, it could not be meant to confine the time to the life of J. Marnell. This, therefore, is an instrument which provides that the lands shall be charged with the sum of 744*l.*, and, being so, though the mode is not that intended by the settlement, yet a Court of Equity will make it a charge according to the mode intended by the settlement.

The deed of 1794 provided that the land should be charged with the sum, and was only defective in adopting the mode of annuity, instead of sale or mortgage.

The case is stronger here, as the legal estate was in James Marnell. The conveyance to James and his heirs was contrary to the settlement; but if a bill had been filed against James, to compel him to execute a conveyance according to the settlement, then there would have been an equity for James, to the extent of his power of charging, of which in his judgment creditors might avail themselves.

On these grounds I think this a right decree, so

April 8, 1816.

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EXECUTION
AIDED—AND—
SUITY.

far as it considers the lands to have been well charged; but, on the part of the Appellants, it is objected that the sum due was not 744*l.*, but a less sum, only 599*l.* 19*s.* With the impression which I have mentioned, I think the decree ought to be affirmed, with a variation as to the sum charged; for it could not be the intent of James Marnell to charge the lands for more than the sum actually due. Ousley has no equity to support his demand against the irregularity in the mode of execution, except as a purchaser for valuable consideration; and he is so only to the extent of the judgments. Your Lordships may therefore order, and adjudge that the charge is well made for the sum actually due on the 6th June, 1794, not exceeding 744*l.*; but that the Appellants shall be at liberty to falsify as to the amount, and with that variation, that the decree be affirmed. It will then stand as a decree that the sum actually due is well charged on the lands, that sum not exceeding 744*l.*, instead of 744*l.* absolutely. If it does not amount to that sum, the Appellants may show that fact. But farther we cannot go; for as Marnell acknowledged on the face of the instrument, that 744*l.* was due, it rests on Appellants to show that a less sum was due.

Lord Eldon (C.) In this case, which I have before, it will be remembered, represented as one of great difficulty, I accede to the proposition of the noble Lord. But at the same time, it must not be understood, that we mean to hold that, where ten-

This not to be taken as a decision that where tenant for life has a

ant for life has a power to charge lands for 1,500*l.* or any other given sum, the grant of an annuity out of these lands is, *in all cases*, to be taken as a good

execution of the power. That is not my meaning, April 9, 1849.
 not; as I understand him, that of the noble Lord;
 but merely that, in the very particular circumstances
 of this case, it may be so taken.

I have already stated that the deed of settlement, considered as a conveyance, is nonsense from the beginning to the end. But looking on it as an equitable contract, it gives J. Marnell a power, *in some way or other*, to charge these lands with a sum of 1,500*l*. In what way, it is very difficult to say, unless you reject the proviso that he should not sell or mortgage, and it is not impossible, that he might have resorted to the mode of execution by annuity, on account of the clause in the deed forbidding him to sell or mortgage. In this case, I think J. Marnell did mean to execute the power; and if it appears from the instrument that such was the intent, it is not necessary that he should refer to the power; for, if he meant to execute, you will refer the act to the power. And the mode too would have been the most beneficial one for the inheritance if he had lived; for if the money had been raised by way of mortgage, the principal would have been a charge on the inheritance, and he would have had only to keep down the interest.

Another consideration is, and for that we are indebted to the noble Lord, that it happened that James Marnell had the legal estate. Whether he ought to have had it or not, is another question. But still he had it, and it would be very difficult to compel him to execute a conveyance according to the settlement, without allowing him to charge in this way. But it is not to be understood that

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power to
 charge the
 lands for a
 given sum, the
 grant of an an-
 nuity without
 reference to the
 power, is to be
 held in all
 cases a good
 execution.
 The mode of
 execution by
 annuity may
 have been sug-
 gested by the
 prohibition to
 sell or mort-
 gage.

April 8, 1816. generally where a tenant for life has a power to charge land to a certain amount, that he may execute the power by granting an annuity or rent-charge.

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INFORMAL
EXECUTION
AIDED, — AN-
NUITY.

No direction
here as to the
mode of exe-
cution.

Lord Redesdale. This case is totally different from the generality of other cases, for there is no direction how to execute the power. It is merely that he shall have a power to charge to that amount; and the meaning of the proviso that he should not mortgage or sell must be, that he should not mortgage or sell so as to defeat the provisions of the settlement; otherwise it would be absurd to say that he should have such a power, and yet should not mortgage or sell, and probably J. Marnell might have been led into this mode of execution by this extraordinary proviso.

Appeal dismissed, and the decree *affirmed*, with liberty to the Appellants to falsify the amount of the sum charged.

Agent for Appellants, BENBOW and ALBAN.
Agent for Respondent, WINDUS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DOUGLAS and others—*Appellants*,
SCOUGALL and others—*Respondents*.

Ship sails, and soon after encounters a storm, becomes leaky, May 17, 1816. puts back, and is found on survey to be materially decayed, and damage discovered which could not be fairly considered as the effect of the storm. Held by the House of Lords *reversing* a judgment of the Court of Session, that the ship was not sea-worthy when she sailed on the voyage insured. INSURANCE.
—SEA-WORTHINESS.

Lord Eldon (C.) observing, that nothing in the law of insurance was of more importance than the implied warranty of sea-worthiness, with a view both to the benefit of commerce and the preservation of human life; that in a question of sea-worthiness, honesty of intention is no answer, but that the fact of sea-worthiness must appear, or otherwise the underwriter is discharged; and that, though a vessel after sailing encounters a storm, yet, unless the damage which unfits her for the voyage can be fairly considered as the effects of the storm, the implied warranty is not complied with.

THIS was an insurance on the ship North Star, and her freight, from Leith to Pictou, in North America, and the question was whether the vessel was *sea-worthy* at the time of her sailing from Leith? Insurance on the ship North Star, and on her freight.

The vessel was an old Dutch prize 350 tons burthen, which had been employed as a whale ship, and was purchased in 1804 by the Respondents at the price of 1,200*l.* including the fishing materials valued at 500*l.* The vessel was put into the hands

May 17, 1816. of *Strachan and Gavin*, ship carpenters in Leith, to prepare her for the voyage to America. The vessel was not stripped nor opened as to enable the carpenters to judge of her internal state and condition; but repairs to the amount of 280*l.* were done to her outer coating or skin, which, in the opinion of the carpenters, put her in a condition to perform her voyage to America, and they certified accordingly.

INSURANCE.
—SEA-WORTHINESS.

Vessel sails
23d May,
1804.

Encounters a
storm; and
becomes
leaky.

And is taken
to Greenock.

On the 23d May, 1804, the vessel sailed on her intended voyage, and on the same day the Appellants underwrote a policy of insurance on her and her freight, to the extent of 2,100*l.* On the 6th and 7th June she encountered a severe gale of wind, and as she began to make so much water that the crew could not keep her free with both pumps, the master bore up for a port, and brought her to Greenock on the 15th June.

Survey.

Soon after her arrival the vessel was surveyed under the authority of the magistrates, by John Scott and Robert Steele, two ship builders, who reported that the vessel was materially decayed. The Respondents called on the under-writers to repair her, but they refused, on the ground that the report proved that she was not sea-worthy when she sailed on the voyage insured. The Respondents then caused her to be repaired, and brought an action in the Court of Session for payment of the amount, being a sum of 1,426*l.* 9*s.* 3*d.* The Lord Ordinary by several interlocutors, in 1807-8-9, decided in favour of the assured, upon the ground of the certificate of sea-worthiness by the Leith carpenters and the protest of the master. Upon petition to the first division of the Court condescendances were

Action, November, 1804.
Lord Ordinary's interlocutors.

ordered and given in, and by interlocutor 20th May 17, 1816.
February 1810, a proof was allowed and led.

The certificate of the Leith carpenters, and the master's protest relied upon by the insured, were as follows :

INSURANCE.
SEA-WORTHINESS.
Court allows
a proof.
Evidence.

“Leith, July 19, 1804.”

“We hereby certify to all whom it may concern, Certificate by
“that the North Star of Leith belonging to Messrs.
“Messrs. Richard Scougall and Co., and others, was Strachan and
“in our dock in April last, and underwent every Gavin.
“repair that was adjudged necessary, for enabling her
“to proceed on her voyage to Pictou, for which
“she was engaged, and that the carpenter's repairs
“amounted to 280*l.* sterling.

(Signed) “STRACHAN & GAVIN.”

In the protest the master stated that, “on the Protest.
“6th and 7th current, June 1804), he met with a
“severe gale of wind, which obliged him to lay
“the vessel to under a close-reefed main top-sail,
“and she then began to make a great deal of water :
“that on the 8th, the vessel shipped a sea, which
“laid her upon her beam-ends ; that he then found
“it necessary to cut away the mizen-boom and sail,
“also the mizen-staysail, to get the ship wore
“round on the larboard tack ; she then began to
“strain and make so much water that they could
“scarcely keep her free with both pumps constantly
“going ; in this situation they continued during
“the gale, till the people were entirely done out at
“the pumps : at six A. M. shipped another sea,
“which sprung the boltsprit, and wrought the stem
“entirely loose ; at the same time washed the boats
“out of the chocks ; the ship at this time making

May 17, 1816. "three feet water in the hour, and the people refusing to stand longer by the pumps, the representative then judged it proper to beat up for the north of Ireland or any other place where they could get the ship in safety."

INSURANCE.
—SEA-WORTHINESS.

The most material documents, however, were the reports of the Greenock ship-builders, especially the first. They were as follow.

FIRST REPORT.

First report of
the Greenock
ship-builders.

In pursuance of the warrant of Nathau Wilson, Esq., justice of the peace, we have this day carefully and minutely examined the ship North Star of Leith, James Edmonstone, master, at present in the dry-dock here. We find the iron-work in general very much decayed, and wrought loose; one rider in the after-hold broke; three lower-deck beams decayed, and sprung abaft the main-mast; three and one-half ditto decayed, and sprung before the main-mast: six lower-deck knees decayed, and sprung; three breast-hooks forward in the lower-hold, and one above the deck, decayed; one plank below the lower-deck beams, on each side, decayed; and two planks on the larboard side of the bilge taken off, to examine the timbers, which we find good, but the iron-work quite gone; the ceiling on the floor, in general, quite loose; the iron-work about the hanging-knees in general decayed, and the timber about the bolts; a part of the outside doubling we have taken off, in order to examine the state of the plank and iron-work; the plank we find good and sound, but the bolts and nails quite gone; the boltsprit is sprung, and the stem wrought loose,

on account of the decayed iron, and labouring of the ship at sea. May 17, 1816.

N. B. There is one top-timber, and two ceiling planks, broke in the 'twixt decks, on the starboard side. INSURANCE.
SEA-WORTHINESS.

(Signed) JOHN SCOTT.

Greenock.
July 12, 1804.

ROBERT STEELE.

SECOND REPORT.

Agreeable to the appointment of Nathan Wilson, Esq. justice of the peace, we have examined and surveyed, a second time, the ship North Star, of Leith, at present in dock here, after the doublings is taken off the bows, and some of the lower-deck beams and breast hooks is taken out, a great number of tree-nail and bolt-holes are bored all over the bottom, from the keel to the bends; most part of the old bolts extracted; we find the timber and plank sound and fresh, as far as can be seen; and it is our joint opinion that, after the repairs going on is completed, and what is pointed out to us by Mr. Scott and Captain Edmonstone, that the ship North Star will be staunch and sea-worthy, and fit to proceed on her present voyage to Pictou in North America.

(Signed) JOHN SCOTT.

ROBERT SLEELE.

FRANCIS MORGAN.

JOHN GALT.

Greenock.
Aug. 10, 1804.

The log-book was not produced in an entire state, a great part of it having been used for making cart-ridges; but some leaves of it were produced, which went to confirm the protest. Neither the master nor any person on board at the time of the storm were examined as witnesses. Steele and Scott were exa-

May 17, 1816.

INSURANCE.
—SEA-WORTHINESS.

inined, and reconciled the first and second report by stating that the second related to parts of the ship which could not be inspected at the time when the first report was made; part only of the doubling or outer planks having been taken off at time of the first report, whereas the whole had been taken off when the second was made.

Interlocutor,
December,
1811.

The Court by interlocutor December 6th, 1811, adhered to the Lord Ordinary's interlocutor reclaimed against. Immediately before pronouncing that interlocutor the Respondents produced, and were allowed to lodge in process, a letter, which had been mislaid, and had not been till then recovered, written to them by Scott, who was employed to repair the vessel after she had been opened up. The letter was as follows.

Additional
evidence.
Scott's letter.

" *Greenock, 28th July, 1804.*

" Messrs. R. Scougall and Co., Leith.

" Gentlemen—Captain Anderson delivered us
" your favour of the 24th instant. Next day we
" began our operations on your ship, the North Star.
" *All the doublings is nearly stript off both bows,*
" *and two of the worst of the lower-deck beams is*
" *taken out, and some of the hanging-knees. The*
" *ship turns out much better than ever we could*
" *imagine. All the timbers in the wake of beam-*
" *ends is perfectly sound and fresh, and nothing is*
" *as yet discovered defective in any part of the ship*
" *that we have opened and examined. The bolts in*
" *the doubling is innumerable, and very difficult*
" *to extract. All the inside plank is sound and*
" *good. We have now a much better opinion of the*
" *ship than we had, and will write you next week*

"how she proves, before we put any thing new on May 17, 1816.
 "her. We remain," &c.

(Signed) "JOHN SCOTT AND SONS." INSURANCE.
—SEA-WOR-
THINESS.

The Court afterwards by interlocutor 29th May, Interlocutor
May, 1812. 1812, remitted to the Lord Ordinary to examine Scott again as to the circumstances set forth in the above letter, and generally as to the state of the vessel.

Scott was accordingly again examined, and the Scott again ex-
amined, 1812. most material part of the deposition with reference to the above letter was as follows :

"Depones, that the second report is perfectly cor- Second depo-
sition of J.
Scott.
 "rect; and he adds, in general, that he is now
 "satisfied that *what he stated in that report, and*
 "*letter of 28th July, is perfectly correct and true.*
 "Being interrogated, if he wishes to alter his former
 "deposition, now that he has seen said letter? de-
 "pones, that he does not. Interrogated for the
 "defenders, whether he is now of opinion, that any
 "of the facts stated, with regard to the state of the
 "vessel, in the first report, was erroneous? de-
 "pones, that he does not wish to contradict the
 "statement made in said report; but he adds, in
 "explanation, that, *from the slight and cursory*
 "*inspection which he made of the vessel at the time*
 "he made his first report, he thought there was a
 "certain decay in her, but, *upon more minute in-*
 "*spection, which he was enabled to make by taking*
 "*off her doublings, she turned out to be in a much*
 "*better state than he at first thought her.* Inter-
 "rogated, whether, if he had known the state of
 "the vessel to be such as it turned out to be, on a
 "minute inspection at Greenock, he would have

May 17, 1816. "considered her in a fit or safe state for a voyage
 "to America from Leith? depones, that he cer-
 "tainly would, and that many ships in a worse state
 "have gone to America and back again; and the
 "Deponent adds, that the vessel in her voyage from
 "Leith to Greenock, had experienced a severe
 "storm and heavy sea, and had suffered by it."

INSURANCE.
 —SEA-WORTHINESS.

Interlocutor 27th May, 1813.
 Appeal. The Court by interlocutor of 27th May, 1813, adhered to the interlocutor reclaimed against; and from these interlocutors the underwriters appealed.

*Sir S. Romilly and Mr. Adam, for Appellants;
 Mr. Serjeant Marshall and Mr. Grant, for Respondents.*

Judgment. *Lord Eldon (C.)* This is a mere question of fact, whether this ship when she sailed from Leith to Pictou in North America was sea-worthy, or well furnished, tight, staunch, and strong for the voyage insured. I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is sea-worthy when she sails on the voyage insured; and I have endeavoured, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of a sound discretion, I have been enabled to do so.

Importance of requiring a strict compliance with the implied warranty of sea-worthiness.

In a question of sea-worthiness the honest intention of the insurer is no answer. The fact of sea-worthiness must appear,

It is not necessary to inquire, whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not sea-worthy, the underwriter is not liable. And this,

I think, may be fairly stated, without imputing any moral blame to the owners in this case, that both they and the Leith ship-carpenters undertook to run some risk ; as it is quite clear that, whether it be customary to strip off the double skins or coatings, or not, unless they do go through that operation, they may, without intending wrong, fall into fatal mistake. Here the stripping off of both skins did not take place, and the outer, if stripped off at all, was but very partially stripped off ; and it is not speaking too harshly to say that the owner was willing she should be repaired at the very least expense that should appear to be necessary.

May 17, 1816.

INSURANCE.
—SEA-WORTHINESS.

otherwise the underwriter is discharged.

The ship sails, and appears to have been for two or three days in a violent storm. If so damaged as that the damage might be fairly considered as the effect of the storm, that is one view of the case. But if damaged in such a manner as in common probability she would not be if she had been sea-worthy when she sailed on the voyage, the implied warranty is not observed.

Though a vessel after sailing on the voyage insured encounters a storm and is damaged, unless the damage is such as can be fairly considered as the effect of the storm, the implied warranty is not complied with.

On the ship coming into port she was surveyed by Scott and Steele, and, whatever Scott might say in 1812, it is clear that he and Steele, applying particular assertions to particular facts, upon this survey, stated that part of the timbers were *decayed*, and that the iron work, in general, was very *much decayed* and wrought loose ; and they distinguished between that sort of decay and the damage which would have been produced from the effect of the storm alone ; and no ingenuity can reconcile this with the construction attempted to be put on Scott's evidence in 1812. Steele states how he reconciles it with his second report, and his evidence goes to

First report.
July 12, 1804.

May 17, 1816. support the effect of the first survey, from which it appeared that the ship was not sea-worthy for that voyage. Scott seems to have forgot his letter of 28th July, 1804 ; and I do not wonder that, when it was produced, the Court felt a curiosity to see how he would reconcile his notion of the state of the vessel on 28th July, 1804, with the first report, and his evidence in 1811. Instead of that plain way in which Steele explains himself, see what species of testimony he gives in 1812 to explain the apparent contradiction. Suppose, however, that he acted honestly in this, still it could never have been laid down here, or recommended in Guildhall that his evidence in 1812 in opposition to his first report, and his evidence in 1811 should do away the effect of all the rest.

INSURANCE.
—SEA-WORTHINESS.

I do not say any thing as to the log-book ; but cases have been sometimes decided on what is not given in evidence, as well as on what is given. If the captain was at the port when the survey was made in 1804, those who wish to support this demand against the underwriters, ought to have called him, and to have asked him “ what do you say as “ to the state of the vessel at the time of this “ survey ? ”

Having considered the whole of this evidence, I never was more clear about any thing than that it is proved to be perfectly manifest, and proved to my entire satisfaction, that this vessel was not sea-worthy for the voyage when she sailed, whatever might then have been the opinion of the owners and carpenters who repaired her ; and if the cause could have come, and had come here originally, I would have recommended to give costs to the underwriters.

But it is not customary to give costs where a decision of the Court below is reversed.

May 17, 1816.
INSURANCE.
—SEA WORTHINESS.

Judgment of the Court below *reversed*.

Agent for Appellants, CAMPBELL.

Agent for Respondents, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MAXWELL and others—*Appellants*.

GORDON—*Respondent*.

ON refusal of the heritors of a parish to take the proper steps Feb. 16, to rebuild the parish church found by the Presbytery to be June 19, 1816. ruinous, the Presbytery themselves advertise for and adopt a plan and estimates, and contract for the rebuilding, and assess the heritors for the necessary sums, but neglect to assess some feuars of a part of a small village included in the parish. Suspension presented by the adverse heritors against the charge for the sums, on the ground of irregularity in the proceedings of the Presbytery, but all objection abandoned as to the jurisdiction of the Presbytery to assess, in case of refusal by the heritors. Suspension refused by the Court of Session, and the judgment affirmed by the House of Lords, with a remit as to the feuars.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

IN consequence of a representation and complaint made by Mr. McCulloch, of Ardwell, one of the heritors of the parish of Anwoth, to the Presbytery of Kirkcudbright, of the ruinous state of the parish

Complaint to
Presbytery of
ruinous state
of Anwoth
church.

Feb. 16,
June 19, 1810.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

Meeting of
Presbytery,
October 1,
1810.

Meeting, No-
vember 7,
1810.

Objection to
the jurisdic-
tion.

Report of the
tradesmen ap-
pointed to ex-
amine the
church.

church of Anwoth, the Presbytery at its meeting, 1st October, 1810, appointed a meeting to be held on the 7th November then next, to take the state of the church into consideration; and the minister of the parish was directed to make intimation to the heritors, by citation from the pulpit and by circular letters, to inform them of the time, place, and purposes of the meeting, and to summon tradesmen to attend.

The Presbytery met at the time appointed, and most of the heritors attended personally, or by proxy, and two tradesmen summoned by the minister of the parish attended to report on the state of the church. An objection taken to the jurisdiction of the Presbytery, by the agent of Sir D. Maxwell, one of the heritors, was repelled; and the heritors, being asked whether they had any objection to the tradesmen, declared they had none; and the tradesmen, being put on oath, were directed to examine the church, and report as to its dimensions and its condition, and whether it was or was not capable of being repaired. The tradesmen reported the dimensions, and also the state of the church, from which it appeared that it was incapable of repair, and also that it was too small to contain the legal number, namely, two thirds of the examinable persons in the parish.

At the request of one of the heritors present at this meeting, the Presbytery, as there were no tradesmen present on the part of the heritors, agreed to delay proceedings till their next ordinary meeting, to give an opportunity to bring them forward; with certification that, if the heritors should then fail to bring forward a report of other tradesmen, the

Presbytery would proceed in the business on the Feb. 16,
evidence before them. June 19, 1816.

The Presbytery met, and the agents of three of the heritors (Appellants) attended. No tradesmen appeared; and no report was produced on the part of the heritors. The Presbytery therefore proceeded to take into consideration the report of the tradesmen given in at their last meeting, and unanimously found "that the Kirk of Anwoth is ruinous, and ought to be rebuilt; and therefore did, and hereby do, ordain the heritors of said parish to procure plans and estimates of a new Kirk, sufficient to accommodate the inhabitants of that parish, and to lay them before the Presbytery, at their next meeting on the first Wednesday of January, with certification, that if they fail to do so, the Presbytery will themselves order plans and estimates, and stent the heritors in a sum sufficient for executing such a plan as may be adopted, as accords of law."

REPAIRING
AND RE-
BUILDING OF
CHURCHES.
Meeting, De-
cember 5,
1810.

The heritors neglect to produce a report of tradesmen named by themselves.

It was not stated, however, whether this sentence of the Presbytery was intimated to the heritors, and none of them appeared at the next meeting, which took place on the 2d of January; but Gordon the agent of Mr. M'Culloch, of Ardwell, attended, and produced several plans, one of which was adopted. The Presbytery then appointed the minister of the parish to advertise for estimates; to convene the heritors by edictal citation from the pulpit and circular letters, and to lay before them the plan and estimates, to give them an opportunity of contracting with tradesmen for re-building the church; and they ordained the heritors to contract accordingly, on the plan adopted, with certification that,

Want of
notice, after-
wards com-
plained of.
Meeting, Ja-
nuary 2, 1811.

Plan adopted
by Presbytery
and heritors,
ordained to
contract upon
it.

Feb. 16,
June 19, 1816.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

Meeting of
heritors, Ja-
nuary 29,
1811.

if the heritors failed to do so, the Presbytery would contract, and stent the heritors in a sum for executing the work.

The heritors having been convened, entered objections on their minutes to the proceedings of the Presbytery; the grounds of which objections were, that the heritors ought to be allowed to have it ascertained, by tradesmen named by themselves, whether the church was capable of being repaired; and if not, the heritors ought to be allowed to give in and execute their own plan, and that the Presbytery had no power to approve or disapprove, except the church were to be too small to accommodate the legal number of persons (two thirds of the examinable persons in the parish), and they also objected to the proceedings of the Presbytery as illegal and irregular.

Meeting,
March 6,
1811.

These objections were laid before the Presbytery at its next meeting, at which the heritors, or some of them attended. The Presbytery however considered the application of the heritors to be allowed to prove, by tradesmen of their own nomination, that the church might still be repaired, &c. as coming too late, and refused the request. The Presbytery then ordered the plan of which they had formerly approved, to be rectified, so as to reduce it to the lowest dimensions, consistent with the accommodation of the legal number of persons; and then having at a subsequent meeting, approved of the plan as rectified, they again ordained the heritors to contract, &c. with certification as before. The heri-

Presbytery or-
ders adver-
tisement for
estimates, and

tors having refused, the Presbytery appointed their clerk to advertise for estimates, and an estimate having been given in, and, at the request of Mr.

M'Culloch, adopted, they pronounced the following sentence: Feb. 16,
June 19, 1816.

“ The Presbytery, having considered the above REPAIRING
AND RE-
BUILDING OF
CHURCHES.
 “ statement and request of Mr. M'Culloch, examined the estimates laid before them, and inserted adopts one
given in, and
assesses the
heritors for the
sum necessary
for the re-
building of
the church.
 “ in their minutes; heard parties at the bar, and October 2,
1811.
 “ reviewed the whole proceedings in the cause, and
 “ fully reasoned thereon, did and thereby do, unanimously adopt the estimate of John Bodan and
 “ Andrew M'Dowal; and appoint a committee of Presbytery, along with the said James Murray
 “ M'Culloch, Esq. and such other heritors of the
 “ parish of Anwoth as choose to concur, and Mr.
 “ Robert Gordon, writer in Kirkcudbright, to prepare and execute a legal and formal contract with
 “ the said John Bodan and Andrew M'Dowal, and
 “ proper and sufficient cautioners, to rebuild the
 “ church of Anwoth, according to the rectified plan
 “ and specifications referred to in their estimate.
 “ The committee to consist of Dr. Muter, Mr.
 “ Johnston, Mr. McClellan, and Mr. Smith, with
 “ any other member of Presbytery who may choose
 “ to attend (any two a quorum), to meet in the
 “ King's Arms Inn, Kirkcudbright, on any day
 “ convenient, before the fourth Wednesday of October current, Mr. Smith convener. Said committee shall bind and oblige said contractors,
 “ with their cautioners, to have the church of Anwoth roofed in before the 1st day of October,
 “ 1812, and the whole work finished before the 1st
 “ day of May, 1813. And farther, that the Presbytery did, and hereby do decern, against the
 “ heritors, life-renters, tenants, tacksmen, and all
 “ others liable for their respective proportions of

Feb. 16,
June 19, 1816.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

“ the sum of 710*l.* sterling, being the amount of
“ the estimate of John Bodan and Andrew
“ M'Dowal; and of the sum of three guineas to
“ James Sharp, for plans and specifications; and of
“ the sum of 3*l.* 11*s.* 6*d.*, being the expense of ad-
“ vertising; and of the sum of two guineas, to
“ Messrs. McClellan and Lawrie, for their trouble
“ in inspecting and making a report on the church
“ of Anwoth; and of the sum of 6*l.* 15*s.* for con-
“ tract and stamp; amounting in toto to 725*l.* 11*s.*
“ 6*d.* sterling, with factor's fee, at five per cent.
“ thereon, and duties of extract. Appoint Mr.
“ Robert Gordon, writer in Kirkcudbright, factor
“ for uplifting said sum, by the following instal-
“ ments, viz. one-third part thereof at the 1st of
“ November next; another third part at the 1st of
“ August, 1812; and the remainder at the 1st of
“ February, 1813; and crave the Right Hon. the
“ Lords of Council and Session to interpose their
“ authority to this decret, that letters of horning
“ on six days, and other execution necessary, may
“ pass hereon.

Charge for
the sums and
suspension.

The proportions were settled by the Presbytery clerk, and Gordon the factor, according to the valued rents; and Gordon then raised letters of horning, and charged the heritors for the sums respectively due by them. The Appellants presented a bill of suspension, in which they confined their objections to the alleged irregularity of the Presbytery's proceedings, without bringing the jurisdiction to assess at all into question. The Lord Ordinary by interlocutor 28th February, 1812, refused the bill, and the Court by interlocutors 11th March, and 16th May, 1812, unanimously adhered. In

their petitions to the Court the Appellants expressly abandoned all objection to the jurisdiction. Feb. 16,
June 19, 1816.

Against the above interlocutors of the Court of Session, the Appellants lodged their appeal, in support of which, resuming the objection as to the jurisdiction, they stated the following reasons in their case. REPAIRING
AND RE-
BUILDING OF
CHURCHES.
All objection
to the juris-
diction aban-
doned.
Appeal.

1st, If the Presbytery have any jurisdiction at all over the repairing and building of churches, their province is strictly limited to a declaration that the church is out of repair, and ought to be repaired; or is ruinous, and ought to be rebuilt; or is too small for the parish, and ought to be enlarged; leaving it to those who are to bear the burden, that is, to the heritors, or the owners of lands and houses, to settle among themselves what shall be the plan of the repairs, or new edifice, as well as all the details both for the assessment of the necessary money and for the application of it.

This is recognized as a general rule, in the case of the Minister of *Tingwall* against the Heritors, decided on the 22d June, 1787.

The case of *Dunning*, 10th June, 1807, (the first which decided that Presbyteries have a jurisdiction in the building and repairing of churches, and which has not yet been brought under the view of this honourable House) is quite consistent with this rule: there the Presbytery had gone no farther than to find that the church was insufficient to accommodate the parishioners, and that certain additions ought to be made; it was with this proceeding, carried no further, that the heritors were dissatisfied, and applied against it to the Court of Session; and the Appellants cannot refrain from adding, that this case of *Dunning* is quite a re-

Feb. 16,
June 19, 1816.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

cent and single decision upon a very important question of law, as affecting the civil rights, of the subject in Scotland; and which, if it were brought to the last resort, the Appellants conceive it would be found very difficult to maintain.

2d, Even if the Presbytery could be admitted to have the power of imposing and assessing the parochial tax, their proceedings throughout this case have been highly irregular. They have also made the assessment irregularly, in point of form, and substantially contrary to the rule declared by this most honourable House, in the case of Peterhead, in Dom. Proc. 24th June, 1802.

3d, It was not necessary, that this church should be rebuilt; the repairs which the heritors had undertaken, and were proceeding to make, would have rendered it quite sufficient, in every respect, for the accommodation of the parish.

With reference to the non-assessment of some feuars in a village, part of which was included in the parish, the Appellants cited, besides the Peterhead case, the cases of Crief, 20th November, 1781; Campbelton, 1774; and St. Andrew's 1791.

In the Respondent's case it was contended, that the Presbytery had jurisdiction to assess, and the case of Dunning, June, 1807, was cited; and that at any rate the objection had been abandoned; that it was absurd to object to the apportionment of the sums, as the Respondent might have charged the whole sum against any one heritor; that the proportion of the feuars was too minute for assessment; and that the whole of the proceedings were regular.

Sir S. Romilly and *Mr. Horner* (for Appellants.) Feb. 16,
 This case involves a most important point of law, June 19, 1816.
 that is, whether a church judicatory in Scotland has power to tax the subject. There is not a single case, nor any authority in the text books for that proposition. The case of *Dunning* does not at all embrace it, for the point was not there raised, whether a church judicatory could tax the subject. It only establishes this, that the Presbytery had jurisdiction to find that repairs were necessary. (*Lord Eldon* (C). What jurisdiction has the Presbytery in this matter?) To find the fact that the church is out of repair and wants repair, or that it is ruinous, and ought to be rebuilt, and, if the heritors refuse the necessary sums for these purposes, then the Presbytery, or the minister of the parish, may apply to the civil Courts to compel them to pay. (*Lord Eldon* (C). The reason in the suspension is, that it is illegal in the Presbytery to assess, unless the heritors were previously called on, and refused to take the proper steps to build or repair the church, and your complaint below was, that you had not been regularly summoned to one of the meetings, so as to give you the proper opportunity. But, to use a technical expression in one of your own papers, you went *slap-dash* at every thing.) The mode also in which the assessments were made was wrong.

Mr. Leach and *Mr. Brougham* (for the Respondents). The Lords, as the Court of Appeal, could look only at the grounds taken below, and would not go on other grounds first suggested here. It never entered into the minds of those who drew

Feb. 16,
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AND RE-
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CHURCHES.

this suspension, that the mode or manner of assessment was irregular; and if that had been stated as a ground of complaint, the papers show that it could not have been maintained a moment. Then they deny the power of the Presbytery to assess at all. That point was never insisted upon below, and, in their own papers, they make admissions which entirely exclude the objection. (*Lord Eldon (C.)*) I take them to have, in their suspension, admitted the jurisdiction. We are not called upon, then, to show that it is the general law, that Presbyteries have this power, because it is admitted to be the law of the case. But suppose the point could be opened, there is not a shadow of foundation for their denial of jurisdiction as applied to this case. All the requisites of the act of 1572 have been followed. The Presbytery did not proceed upon the assumption of an unqualified power to assess, but only claimed and acted upon the jurisdiction to assess, after the heritors had been called upon and refused to assess themselves. They say, the Presbytery ought not to assess at all, but to apply to the civil power; how are they to apply, and to what part of the civil power? They called upon the heritors to assess themselves, with a clear notice that unless they did the Presbytery would do it. The heritors refused, and the Presbytery proceeded to stent them. As to the Peterhead case, the objection there was not taken here, and though it had been taken, the circumstances were different. The effect of the decision in that case was, that the heritors, as well as feuars, should be assessed, not according to their nominal or valued rent, but according to their real rent. That is not the question here. The town

proprietors were there assessed, but the parish included a large sea-port town, and the church was principally occupied by the town population, and it was but just that the town proprietors should pay part of the expense. But this was strictly a land-wart parish, including only a very small part of a small village, and the smallest coin was not small enough to represent the proportion of each of the twelve or fifteen feuars belonging to the parish.

Feb. 16,
June 19, 1816.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

Sir S. Romilly (in reply). The important question, it seems, is not open to us, as it had been waived on our part. But if we have admitted the jurisdiction, it was only on failure of the heritors to contract and rebuild; and no opportunity was given them for that purpose. Then the feuars were not taxed, and it was quite clear from the Peterhead, and other cases, that the feuars ought to be called upon to pay their proportions. (*Lord Eldon* (C.) This case, I believe, turns on the facts whether the church was capable of being repaired, or sufficient for the congregation.)

Lord Eldon (C.) I am of opinion that the judgment in this case ought to be affirmed, but subject to a remit to the Court of Session, to consider whether, having regard to what this House did in the Peterhead case, the judgment requires any alteration with respect to the feuars. I understand it will not, as the proportion of these feuars must be so very minute, that the Court did not ill advise themselves in overlooking it. But *we* cannot with propriety omit to notice that point, though the remit may have no effect.

June 19, 1816.
Judgment.

June 19, 1816. Judgment *affirmed*, subject to a remit as above,
 in case the Appellants chose to bring the question
 as to the feuars before the Court within four
 months.

REPAIRING
 AND RE-
 BUILDING OF
 CHURCHES

Agent for Appellants, GORDON.
 Agent for Respondent, RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SPROTT (Procurator Fiscal of Edin- } *Appellant.*
 burgh) }
 SCOTT and others—*Respondents.*

Feb. 21, 1816. ANY master trader or manufacturer exercising his trade or
 calling within the new town of Edinburgh only, without
 exercising it in the old, is, by the proviso in the act 7 Geo.
 3. c. 27. exempted from the payment of the tax called
 entry money, exacted by the magistrates of Edinburgh
 from those who enter as burgesses.

TRADERS AND
 MANUFAC-
 TURERS IN
 NEW TOWN OF
 EDINBURGH
 EXEMPTED
 FROM PAY-
 MENT OF EN-
 TRY MONEY
 TO THE MA-
 GISTRATES.

Builders in
 New Town,
 Edinburgh.

Refuse to pay
 entry money,
 and why.

THE Respondents are master builders in the new
 town of Edinburgh, who refused to pay to the
 magistrates the entry money which each master
 trader or manufacturer who establishes himself in
 the city and exercises his craft within its limits or
 royalty is called upon to pay. The ground of the
 refusal was, that the act of 7 Geo. 3. c. 27., by which
 the royalty was extended over a great part of the

new town of Edinburgh, did not entitle the magistrates to that tax. The question therefore depended on the construction of that act; the material part of which, as far as relates to the present purpose is as follows :

Feb. 21, 1816.
 TRADERS AND
 MANUFACTURERS IN
 NEW TOWN OF
 EDINBURGH
 EXEMPTED
 FROM PAY-
 MENT OF EN-
 TRY MONEY
 TO THE MA-
 GISTRATES.
 Act Geo. 3.
 c. 27. Pream-
 ble.

“ And whereas the Lord Provost, Magistrates, and council of the said city, as well in further execution of the before recited act as in view to the extension aforesaid, have expended large sums of money in purchasing houses and areas on the north side of the High-street of the said city, and in building a bridge, whereby an easy and proper communication will be opened to the city :

“ And whereas the grounds after-mentioned are without the royalty of the said city, and it being just and reasonable that the royalty of the said city should be extended over these grounds, in consideration of the great expense the city has been and will be put to in building the said bridge, and making the communication and access to the said city otherwise easy, and for the equal apportioning of public burdens and benefits, and administration of justice amongst all the real inhabitants of the place ; but as this salutary purpose cannot be accomplished without the authority of parliament, &c.” therefore it is enacted, “ That from and after the 24th day of June, in the year of our Lord 1767, the royalty of the City of Edinburgh shall be extended over, and comprehend the following lands which now belong in property to the said city, &c.” (The Lands are then enumerated.) “ And that the said magistrates and town council, from and after the said 24th day of June, in the year of our Lord 1767, shall

Feb. 21, 1816.

TRADERS AND
MANUFAC-
TURERS IN
NEWTOWN OF
EDINBURGH
EXEMPTED
FROM PAY-
MENT OF EN-
TRY MONEY
TO THE MA-
GISTRATES.

“ have and enjoy the same rights, privileges, and jurisdictions over the said grounds hereby annexed to and comprehended in the said royalty, as they do now enjoy and exercise over and within the limits of the present royalty by any law, statute, or established custom, and shall and they are hereby empowered to levy the same mails, duties, customs and other taxations, within these annexed grounds, in the same manner and by such actions at law as the said magistrates and town council are entitled to use by any law, statute, or otherwise, within the present royalty, for recovery of such mails, duties, customs, and taxations, as aforesaid.”

Proviso.

The following clause is that on which the Respondents' argument was founded : “ Provided always, and it is hereby enacted and declared, that it shall and may be lawful to all and every person and persons to exercise any trade, or calling, within the limits of the lands hereby annexed to, and comprehended within the said royalty, any thing in the present act to the contrary notwithstanding : saving always, and reserving to the several societies and incorporations, within the city of Edinburgh, all such rights and privileges which do now belong and are enjoyed by them within the limits of the present royalty of the said city.”

For the Respondents it was contended that by the above proviso, the exercise of any trade or calling in the new town was left perfectly open and free ; saving however all corporate rights within the old Royalty.

The Appellant contended that the act ought to be

construed with reference to the constitution of the royal burghs, and the exclusive rights of burgesses, in carrying on trades and handicrafts within burghs, as established from the earliest times by different acts of the Scottish Parliament; and recognised in the decisions of the supreme Court in that country. He referred to the statutes of King William of Scotland, intituled, "The Libertie of the Merchantis Gilde," cap. 35 and 36. He also referred to the *Leges Burgorum*, cap. 18. by which it was enacted "that stranger merchants should buy and sell from burgesses only;" and cap. 139. of the same laws, declaring, "that burgesses may buy and sell freely within all parts of the realme."

Feb. 21, 1816.
 TRADERS AND
 MANUFACTURERS IN
 NEW TOWN OF
 EDINBURGH
 EXEMPTED
 FROM PAYMENT OF ENTRY MONEY
 TO THE MAGISTRATES.

The Appellant next referred to the acts 1466, cap. 11. 12. and 13. as establishing the same exclusive privileges in favour of burgesses within royal burghs, and to the acts 1592, cap. 154. and 155. declaring an obligation on all burgesses to pay entries, dues, and taxes, and perform burgage services. Reference was also made to the acts 1672, cap. 5.—1690, cap. 12.—1693, cap. 28.—and 1698, cap. 19. and 20.

It was further observed by the Appellant, that these rights and privileges belonging to royal burghs, and to the individual burgesses, for which in return persons made burgesses were to pay certain sums of money in name of entries and taxes, were confirmed and rendered perpetual by the twenty-first article of the treaty of union (1707, cap. 7).

The Appellant next took notice of the following decisions pronounced by the Court of Session in support of the rights and privileges of royal burghs and of burgesses, as by law established, viz. *The*

Feb. 21, 1816. *Magistrates of Glasgow against the Writers*, 21st November 1695, and 13th December 1695, reported by Lord Fountainhall—*Websters, Freemen in Stirling, against Unfreemen*, 26th March, 1658, reported by Durie; in which it was found that craftsmen unfreemen cannot exercise their trade within burgh, but may work in their houses in the suburbs—*Town of Linlithgow against Unfreemen of Borrowstonness*, 30th January, 1663; reported by Lord Stair, vol. i. p. 165—*Town of Glasgow and Dumbarton against Unfreemen of Greenock*, 7th December, 1676, reported by Stair, Dirleten, and Gosford—and *The Corporations of Mary's Chapel against Kelly*, 14th January, 1747, reported by Falconer: and he referred particularly to the following case, which most strongly recognised the rights of the magistrates of royal burghs to demand, that those exercising trade or craft within their burghs should become burgesses, and pay the accustomed dues or tax at entry:—*Duncan against the Magistrates of Aberdeen*, 21st July, 1786, of which the following account is given in the Faculty Collection: "Between the years 1620 and " 1675, the fine or composition, paid in the town of " Aberdeen by intrans burgesses, had been gradually increased by the magistrates from 100 to " 400 merks. In 1699 these dues of entry were " reduced to 100 merks; and on this footing matters continued till 1779. About this time the " trade of the town had greatly increased. A considerable debt too had been incurred in building a " commodious harbour, and in other improvements " of the same nature; and the dues of entry were " augmented to 25*l.* sterling. Alexander Duncan

TRADERS AND
MANUFACTURERS IN
NEWTOWN OF
EDINBURGH
EXEMPTED
FROM PAYMENT OF ENTRY MONEY
TO THE MAGISTRATES.

Duncan v.
Magistrates of
Aberdeen.
Fac. Coll.
July 21, 1786.

" and other unfreemen brought an action for setting Feb. 21, 1816.
 " aside this regulation," of which they complained
 as an undue extension of the town's privileges. TRADERS AND MANUFACTURERS IN NEW TOWN OF EDINBURGH EXEMPTED FROM PAYMENT OF ENTRY MONEY TO THE MAGISTRATES.
 " Answered what is here complained of as an undue
 " extension of the privileges conferred on this town
 " is only a proper exercise of its established rights.
 " The benefit of exclusive trade forms an essential
 " part of the constitution of every corporation of
 " this sort, nor has any limitation been imposed as
 " to the manner in which it is to be communicated
 " to Strangers. As a due regard must necessarily
 " be paid to the advantages arising from such a com-
 " munication, this will always vary as trade and
 " commerce are thriving or in a declining state.
 " Thus the present alteration is fully justified by
 " the circumstance of the case; and the necessity
 " of an additional revenue on account of the ex-
 " penses recently incurred for the general utility
 " renders it altogether unavoidable.

" The Court were unanimous in sustaining the
 " defences. Even the Judges who, in the question
 " from the town of Glasgow, voted against the ex-
 " action of the new imposts of any sort without
 " Parliamentary authority, expressed their opinion
 " that the price of the right of burgessship might
 " be proportioned by the magistrates to the benefits
 " accruing from the participation of trade. The
 " Lords sustained the defences, thus giving effect to
 " the regulation in question."

The Appellant then proceeded to comment on the
 act of the 7 Geo. 3. for extending the royalty of the
 City of Edinburgh, and attempted to show that the
 clause in this statute, founded on by the Respond-
 ents, did not establish in their favour the exemption

Feb. 21, 1816. **TRADERS AND MANUFACTURERS IN NEWTOWN OF EDINBURGH EXEMPTED FROM PAYMENT OF ENTRY MONEY TO THE MAGISTRATES.** which they claimed; and contended that the just construction of the clause in the act of Parliament founded on by the Respondents is, that it shall and may be lawful to all and every person and persons (*being burgesses*) to exercise any trade or calling within the limits of the annexed lands, although they be not entered with any of the inferior corporations of the city, saving and reserving to these incorporations their rights and privileges within the old royalty. This qualification, that persons exercising trade within the new royalty, although not entered with any of the corporations, must nevertheless be *burgesses*, was one which might either be expressly mentioned or might be omitted in the act of Parliament, for it imports nothing more than a statement of the public law of the realm, and was therefore as much to be understood and implied, though not expressed, as that the persons exercising trade should be liege subjects of the King and not aliens.

Action.

Judgment for the builders, establishing the exemption *affirmed* on appeal.

Upon action in the Dean of Guild Court for this entry money Spratt, the Procurator Fiscal for the city, obtained decree against the Respondents for payment. The decree and cause having been brought by suspension before the Court of Session, where, by interlocutor 6th of Dec. 1810, judgment was given in favour of the Respondents, and this judgment, upon appeal argued in the House of Lords on 21st of Feb. 1816, was *affirmed*.

Agents for Appellant, SPOTTISWODE and ROBERTSON.
Agent for Respondents,——.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BULLEN—*Appellant.*MICHEL (Clerk)—*Respondent.*

BILL, by Vicar of Sturminster Newton, for vicarial tithes June 10, 12, in kind against several occupiers of farms. Answers (see 13, 1816. parate) setting up farm moduses. Issues directed, and the issue respecting Bagber farm (Bullen's) tried. Proof for Appellant Bullen, Plaintiff in the issue, by the evidence of old persons that a sum of 5*l.* 3*s.* 4*d.* had been invariably paid for the vicarial tithe of Bagber farm for about sixty years past. Offered in evidence for Defendant (the Vicar), to prove rankness, a rate-paper, from which it appeared that the whole parish had, during the same period, paid rates in the same way in lieu of vicarial tithes, amounting together to 68*l.* Offered also certain entries, without date, but proved to be of the hand-writing of the end of the thirteenth or beginning of the fourteenth century, in a book called the Chartulary of Glastonbury Abbey: viz. an entry of the ordination of the Bishop on the appropriation of the church of Sturminster to the Abbey: and the entry immediately following, beginning with the words "portions of the church of Sturminster assigned to the vicarage to be ordained to remain in the same for ever," and then enumerating the several articles with the value of each, without any allusion to a money payment in lieu of the tithes, and making the whole vicarage of the clear yearly value of 9*l.* 12*s.* 5½*d.* This entry was offered as a copy of, or extract from, the endowment, the original being lost. The book was produced from the muniment room of the Marquis of Bath, who had lands which had belonged to the Abbey, but not in Sturminster Newton. Besides entries in which the Abbey was concerned, the book contained several idle stories, and a great deal of other miscellaneous matter. The rate-paper and Chartulary rejected, and verdict for the modus. But the Court of Exchequer, being of opinion that these documents ought to be admitted, ordered a new trial. Proof for Appellant as before, and the rate-paper and entries in the Chartulary read for the Respondent,

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

besides other documents, to rebut the presumption of a *modus*. Verdict for Respondent, and against the *modus*; and new trial, moved for on the ground of the alleged improper admission of the Chartulary in evidence, refused—and appeal to the Lords from this order of refusal.

Objections to the admission of the entries:—1st, that the book did not come from the proper custody; 2d, that the endowment itself could have been no evidence on this issue; and if it could, yet the entry respecting the portions assigned to the Vicar did not purport to be a copy or extract, and was not good secondary evidence; 3d, that this was *res inter alios acta*.

The order of the Court of Exchequer refusing the new trial *affirmed* by the House of Lords on the grounds, 1st, that the entries had been properly received in evidence, the custody being proper, the entries being authentic copies of instruments of which the originals would have been good evidence; and *res inter alios acta* being in this case no objection, and also that the whole of the rate-paper was proper evidence on this particular issue: 2d, that, supposing the entries to have been improperly admitted, the verdict was warranted by the other evidence, and that it signified nothing to say that the Jury might possibly have come to their conclusion upon the ground of the Chartulary, because the object of an issue out of equity was to satisfy the conscience of the Court; and where the evidence was such as fully to satisfy the conscience of the Court, a Court of Equity was not bound, either in tithe causes or others, to order a new trial, or to direct an issue originally at all; exercising, however, a sound discretion in each particular case, whether to do so or not.

June 10, 19,
13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.
Parties.
Parish and
manor of
Sturminster
Newton.

THE Respondent, Michel, is Vicar of the Parish of Sturminster Newton in the County of Dorset; and the Appellant Bullen, is the occupier of Bagber farm in that parish. The question was, whether a certain payment in lieu of small tithes for that farm was or was not a *modus*.

The parish contains from 4000 to 5000 acres of land, the greater part of which was formerly under

the plough; but now the lands are converted into pasture or meadow, except about 240 acres. There are in the parish seven fields called "the Common Meads," containing about 120 acres, divided into small allotments held in severalty till the hay is cut, after which they become common to all the tenants of the manor of Sturminster Newton. This manor, comprehending the greater part of the lands in the parish, and the advowson of the rectory, formerly belonged to the Abbey of Glastonbury, as did also the advowson of the vicarage from the time of its endowment till the dissolution of the monasteries by Henry VIII.

June 10, 12,
13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

From 1743 till 1800, the incumbents were the Rev. Henry St. Loe, the Rev. John Bird, and the Rev. William Butler. There was no evidence that any tithes, great or small, had been paid in the parish during the memory of any living person; but, during the incumbencies of the three persons mentioned, every occupier of land in the parish paid a certain money-rate for the small tithes of the whole of his land, exclusive of the Common Meads, the occupiers of which paid a certain other distinct rate for the meads.

Tithe-rates.

The Respondent was instituted in 1800, and accepted the rate payments in 1800 and 1801; but, thinking them inadequate to the value, he gave notice that they were to determine on St. Thomas's-day, 1802, and invited the occupiers to make new compositions, which being refused and the payment of the tithes in kind resisted, he filed his bill in the Exchequer in M. T. 1804, against Bullen, Williams, Rabbetts, Dashwood, and Atchison, five of the

1800. Re-
spondent insti-
tuted Vicar.

Tithes in kind
refused.

Bill, 1804.

June 10, 12,
13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

Answers,
1806. Modus.

principal occupiers, praying an account and payment of the single value of all their tithes, except corn and grain. The defendants answered separately, admitting the Respondent's title as Vicar, but insisting that the payments were moduses, or ancient customary payments to the Vicar in lieu of all tithes except corn and grain, exclusive of certain lands occupied by Dashwood and Atchison in the Common Meads, the tithes of which were admitted to be due.

May 5, 1810,
decree. Issues
directed.

The cause was heard in Nov. 1809, and on May 5, 1810, it was decreed that the parties should be referred to trials at law, in feigned actions, in the nature of issues upon the several farm moduses laid by the Defendants in their separate answers; and an account was ordered of what was due to the Vicar from the two Defendants Dashwood and Atchison, for tithes admitted to be due in respect of the Common Mead lands, the other three Defendants having no lands in the Common Meads. The Vicar procured a re-hearing of the cause upon that part of the decree which directed issues; but the Court, Jan. 22, 1812, affirmed the decree. The form of the sixth issue, the only one now in question, was as follows, viz. "Whether from time immemorial the occupiers or occupier of the farm and lands called Bagber farm have or hath paid, and have or hath been accustomed to pay, and ought of right now to pay, to the Vicar of the parish of Sturminster Newton, on St. Thomas's day in each and every year, a certain modus, or ancient customary yearly payment of 5*l.* 3*s.* 4*d.* for, in lieu, and full satisfaction and discharge of

Form of the
issue.

“ the tithe of hay and grass seeds, and of all other
 “ titheable matters and things (except corn and
 “ grain) yearly arising, growing, and renewing upon
 “ and throughout the said farm and lands called
 “ Bagber farm.” And it was further ordered that
 the Appellant should be Plaintiff, and the Re-
 spondent Defendant at law in the said issue.

June 10, 12,
13, 1816.

TITHES.—
 MODUS.—
 RANKNESS.—
 ISSUE.—EVI-
 DENCE.—
 NEW TRIAL.

The Defendants in equity being Plaintiffs at law, had an opportunity of setting down the issues in the order most advantageous to themselves, and they selected the sixth as the first to be tried, being that of the Defendant Bullen, the present Appellant, whose farm, called Bagber farm, contains 146 acres, Bagber farm. 3 rods, 25 perches, and whose tithe rate was 5*l.* 3*s.* 4*d.*, being about 8½*d.* per acre. The record next in order was that of the Defendant Williams. The issues in these two records were tried at Dorchester, before Mr. Justice Chambre and a special Jury, on July 17 and 18, 1812.

On the trial of the issue as to Bagber farm, Bullen, the Appellant, proved by the testimony of some old persons, that no tithes in kind had, within their recollection, been rendered for Bagber farm ; but that the above-mentioned payment had been annually made in lieu of the vicarial tithes. Receipts given by Mr. St. Loe and his successors were produced to prove the same payment ; and it appeared on the cross-examination of one of the Appellant's witnesses, that the payments for the rest of the parish, as well as for Bagber, were collected from one and the same paper called “ the rate-paper.” The Vicar on the other hand, to show that the pay-
 ment was so large that it was incredible it should

First trial,
July, 1812.
Appellant's
evidence.

Respondent's
evidence.

June 10, 12,
13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

Evidence of-
fered and re-
jected.

have been made so far back as the time of legal me-
mory, produced several documents, hereinafter more
particularly mentioned, to prove the value of the
vicarage at different periods. The Respondent then
offered to give in evidence—1st, “the rate-paper,”
to show that the uniform payment in lieu of tithes
was not peculiar to Bagber, but extended over the
whole parish; 2d, certain entries in a book, called a
Ledger-book or Chartulary (hereinafter more parti-
cularly mentioned) of the Abbey of Glastonbury,
brought from the muniment room of the Marquis
of Bath; 3d, certain accounts of the reeves of the
Abbey for the manor of Newton (also found in the
custody of the Marquis of Bath), for the purpose of
showing that the reeves obtained allowances and ac-
quittances in their accounts with the Abbey for va-
rious articles of small tithes arising from demesne
lands of the manor, as having been rendered in kind
at different periods subsequent to the time of legal
memory. These three last heads of evidence were
rejected by the Judge; and, the evidence being the
same on the second issue, verdicts were found on
both records in favour of the moduses.

Verdict for the
modus.

Motion for a
new trial.

On Nov. 10, 1812, the Respondent obtained an
order of Court to show cause why a new trial should
not be granted, on the ground of the rejection of
the above-mentioned evidence; and cause having
been shown in H. T. following, judgment was re-
served; and the Chief Baron Macdonald having
in the mean time resigned, the matter was re-argued
before Sir Vicary Gibbs, his successor, and the other
barons, on Feb. 21, 1814. The objection to the
rate-paper, or rather to the general application of it,

Objections to
the rejected
evidence.

was that the other payments were not proper evidence on the particular issue. The reeves' accounts were not at all produced on the second trial. The objections to the chartulary were—1st, that it did not come from the proper custody; 2d, that the entry could not be received as secondary evidence of the endowment, not purporting to be either a copy or extract, and that even the endowment itself would be no evidence; 3d, that at any rate it was not admissible evidence between the present parties, being *res inter alios acta*. On Feb. 23, 1814, the Chief Baron Gibbs delivered the opinion of the Court that the rejected evidence ought to have been received; and a new trial was accordingly ordered.

The cause was tried on March 18, 1814, at Dorchester, before Mr. Justice Bayley, and a Special Jury. The evidence for the Appellant was as follows:—

The depositions of Amos Chin (a witness who had been examined for the Appellant in Equity, and was since dead) were read, and proved his knowledge of the farm for 70 years; that it had always during his recollection consisted of the same parcels; and that no tithes in kind had ever, to the witness's knowledge or belief, been set out to, or demanded by, the Vicar. The depositions of another witness, James Castleman, examined in Equity, and unable to attend at Dorchester, were also read, and proved his knowledge of the farm for sixty or seventy years, he having himself occupied it three years, and always lived near it; that it always, during his recollection, consisted of the same parcels; that no tithes in kind had ever, to the witness's knowledge,

June 10, 13,
13, 1816.

TITHES.—

MODUS.—

RANKNESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.

New trial or-
dered.

Second trial,
March, 1814.

Appellant's
evidence.
Modus.

June 10, 12,
13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

been paid to, or demanded by, the Vicar ; that he had heard that payments had been made to the Vicar about Christmas in lieu of the tithes of the parish. Richard Moore, aged 72, proved that he had collected the payments for tithes from about the year 1760, and that his father collected them when he first remembered. He proved the hand-writing to about sixteen receipts, for the sum of 5*l.* 3*s.* 4*d.*, expressed to be paid by a Mr. Joyce, a former occupier of Bagber farm, and other succeeding occupiers, due at St. Thomas's day, in different years, from 1754 to 1791, most of them expressed to be "for a year's tithe," some of them "for rates," or "rates for tithes," and some generally for the farm. These receipts comprised the rates for three other farms, occupied along with Bagber farm, but now in other hands, which made the total payment 7*l.* 14*s.* 6*d.*

Rates.

On his cross-examination he said that, on the Sunday before St. Thomas's day, he always gave a public notice, which was read by the clerk in the church, that the tithes of the parish were to be paid on the 21st of December ; that he collected for the whole parish from a rate, and that the papers shown him were some of those rates ; that the whole parish was under these money payments ; that when he first knew the parish the Common Meads stood by themselves. He proved the paper indorsed "The rate for the Common Meads" to be that from which he collected the rates for the Meads. Examined by the Judge, he stated that in collecting the rates he made no distinction between Bagber farm and the other parts of the parish. He believed

Mr. Joyce was the only person who required a receipt (his payment was the largest). In general the payments were only marked off on the rate-paper.

June 10; 12,
13, 1816..

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MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

From the rate-paper thus referred to by Moore it appeared that the sum total of the yearly payments was about 68*l.* exclusive of the Mead payments, which amounted to about 10*l.* more, making about 78*l.* in the whole. Of this evidence for the Appellant it was afterwards observed by Lord Redesdale that it was not conclusive, but raised a presumption of a *modus*; and that, as it was proved that all the payments were made in the same way as this for Bagber farm, the presumption must be that all of them were moduses, or that none of them was so.

Lord Redes-
dale's observa-
tions on this
evidence.

To rebut this presumption the Respondent produced several documents to show, as already stated, that the payments were so large that it was incredible they could have been made so far back as the time of legal memory. But, first, Richard Moore proved that he collected from all the persons named in the rate-paper, in the same manner as from the occupiers of Bagber farm; that the gross sum of the rates remained the same, though the number of payments was afterwards increased; that he collected the Common Mead tithe-rates from another rate-paper; that most of the lands in the parish had the appearance of ridge and furrow, as if formerly ploughed. Then an extract from Domesday Book was read, to show the state of the parish, and the value of land there at the time of that survey. It was then found that the church of Glastonbury held the manor of Newton, consisting

Respondent's
evidence.
Rankness.

Rate-paper.

Domesday
book, 1086.

June 10, 12,
13, 1816.

TITHES.—
MODUS.—
RAKENESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

of 25 carucates (that is to say, from 2,400 to 3000 acres, the contents of a carucate being from 100 to 120 acres), besides which there were 14 carucates in demesne which were never taxed. There were at that day (as at present) three mills, and only sixty-six acres of meadow. The woods were two miles and a half long, and one mile broad (now there is scarcely any wood). The whole had been formerly worth 30*l.*, but at the time of the survey was only worth 25*l.* Eleven carucates were then worth 7*l.* (being about 1*½d.* per acre). This extract, Lord Redesdale afterwards observed, proved little except the extent of the parish.

The Chartu-
lary. Account
of it.

In order to introduce the Chartulary, Charles Bowes proved a search in the Bishops of Bristol and Salisbury's Registries (it did not appear that any search had been made in the Augmentation Office) for the original endowment, or a record of it, and that none was to be found. Thomas Davis, Steward of the Marquis of Bath, produced the book, called the Chartulary, from the muniment room of the Marquis, who was proprietor of certain lands which had once belonged to the Abbey, though he had none in Sturminster Newton. This book, together with entries relative to the rights of the Abbey, contained a great deal of miscellaneous matter, including several idle stories; such as, an account of the giants who originally inhabited the British island, a genealogy of the kings of England, beginning from Adam, something *de pondere lanæ*, a calendar, a list of bulls and licences, &c. Then, after an entry of the date 1333, came the entries, without date, relating to the appropriation of the

Entries with
respect to
Newton.

rectory and endowment of the vicarage of Newton. June 10, 12, 13, 1816.
 The first was entitled "Ordinacio Dñi Epī et capituli Saī super donacionē et appropriacionē Ectæ de Nywtonē et Sturminster." And then followed the ordination; and after that, with the title "*Ordinacio Vicarie de Sturminster*" prefixed, came the second entry, supposed to be a copy or extract of the endowment, stating the portions of the church of Sturminster *assigned* (the appropriate technical term used in ancient endowments) to the vicarage, to be ordained to remain in the same forever. "*Porcōes ecclē de Sturmynstr assignate vicarie ordiande in ead ppetuis tēpibz duratur Mansū cū gardiō & valet, &c.*" Then the several articles, with the annual value of each, were separately stated, from which it appeared that the net annual value of the vicarage was, at the time of the entry, *gl. 12s. 5½d.* There was no mention in it of any money payment in lieu of tithes. A witness proved the hand-writing to be of the time of the 1st, 2d, or 3d, Edwards, or about the end of the 13th or beginning of the 14th century. The taxation of Pope Nicholas (afterwards mentioned) proved that the endowment itself must have been made before 1291; and the Judge, having over-ruled objections which had been urged against the reading of the entries, stated to the Jury that the entry appeared to be contemporaneous with the endowment, and was material evidence, as raising the inference that such a money payment as that now contended for could not then have existed. In the early part of the book there was an Index or summary of the contents, entitled, "*Kalendar Sequentis Operis,*" in

TITHES.—
 MODUS.—
 RANKNESS.—
 ISSUE.—EVI-
 DENCE.—
 NEW TRIAL.

Read for the Respondent.

Entry. Sup-
 posed copy of,
 or extract
 from, the en-
 dowment,
 and supposed
 date about
 1269.

June 10, 12,
13, 1816.

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MODUS.—
RANKNESS.—
ISSUE.—EVP-
DENCE.—
NEW TRIAL.

which, at the commencement of the enumeration of those instruments which related to Newton, the following entry appeared, "*Deficit Ordinatio Vicarii Nywton.*" This entry was read on the part of the Appellant, but it did not seem to be considered as of much weight even by the Appellant's counsel.

Valor of Pope
Nicholas.
1291.

The valor or taxation of Pope Nicholas, in 1291, was then read, by which it was found that the vicarage of Sturminster Newton was then of the estimated yearly value of 10*l.*, and that the rectory was estimated to be worth 13*l.* 6*s.* 8*d.*, making in the whole 23*l.* 6*s.* 8*d.* Of this, it was observed by Lord Redesdale that, being a taxation, the estimate must be supposed to be rather under than above the real value. A writ of *ad quod damnum*, directed to the King's Escheator for the county of Dorset, in 37 Ed. III., to inquire whether it would be to the prejudice of the Crown to license the conveyance in mortmain, by Hugh Pembrigge and others, to the Abbey of Glastonbury, of three messuages, and 195 acres of land in East Bagber (being that quarter of the parish in which the Appellant's land is situate), and the inquisition thereupon taken on oath, were read, whereby it appeared that the Jury were charged to inquire, amongst other things, how much these lands were worth by the year in all issues, according to the true value of the same, and that the jury on their oath assessed the value at 2*l.* 2*s.* 2*d.* being 2½*d.* per acre. So that, as was afterwards observed by Lord Redesdale, upon the supposition of a modus, the payment of 5*l.* 3*s.* 4*d.* being about 8*s.* 4*d.* per

Ad quod
damnum,
37 Ed. 3.

Observation
by Lord Re-
desdale on
this part of the
evidence.

acre, the vicarial tithe alone of an acre of Bagber June 10, 12, farm must have been, so far back as the time of 13, 1816. legal memory, of from three to four times the TITHES.— whole value of an acre of East Bagber, in 37 Ed. MODUS.— RANKNESS.— III., which is within the time of legal memory. ISSUE.—EVI- DENCE.— The general ecclesiastical survey, taken in pursu- NEW TRIAL. ance of an act of parliament in 26 Henry VIII., Survey, was read, whereby it appeared that the vicarage of 26 Hen. VIII. Sturminster Newton, with the chapel of Bagber annexed, was stated to be of the clear yearly value of 16*l.* 16*s.* 6½*d.* A terrier, returned to the Bishop's Terrier. Court in 1784, of the glebe-lands belonging to the vicarage was read, to show the quantity to be sixty-five acres; the annual value of which, in 26 Henry VIII. (1535), appeared by the survey of that date to have been 4*l.*, or about 1*s.* 3*d.* per acre.

Upon this evidence the Jury found a verdict for Verdict. No the Vicar, and against the modus. The records of Modus. the remaining issues were withdrawn by consent, and it was agreed that they should abide the event of this cause; and a rule of *nisi-prius* was made accordingly, which was afterwards, May 17, 1814, made a rule of Court. In May, 1814, the Appel- Appellant moves for a third trial. lant, on objections stated to the admissibility and relevancy of the entries in the Chartulary, obtained an order *nisi* for a third trial of the issue as to Bagber farm; but, upon cause shown, that order New trial re- was, on Jan. 25, 1815, discharged: the Court, fused. with the exception of Mr. Baron Wood, being of opinion that the entries had been properly read in evidence. Against this order of discharge, of Jan. 25, 1815, Bullen appealed to the Lords, praying Appeal

June 10, 12,
13, 1816.

TITHES.—
MODUS.—
RAKENESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

the House to reverse the same, and order a new trial of the issue as to Bagber farm. It appeared from a statement of one of the counsel for the Respondent, in answer to a question by the Lord Chancellor, that they were permitted to read the entries in the Chartulary only for the purpose of raising the inference that tithes in kind had been paid to the Vicar within the time of legal memory, and were prevented from using them as evidence of an endowment within legal memory, so as, on that ground, to upset the prescription.

Reasons of
appeal.

The reasons of appeal in the Appellant's case, signed Lens, Dauncey, Gazeley, Casberd, and Heald, were these.

1st, Because the said book called the Chartulary was not sufficiently authenticated by being traced to the proper custody, so as to render the same legal evidence.

2d, Because, supposing the said book to have been sufficiently authenticated, the entries therein are not of such a nature as to be legally receivable in evidence. They do not purport to be an original instrument, nor a copy of an original instrument, nor a substitute capable of being received in the absence of an original instrument; nor do they profess to be an extract of any description, or an original declaration proceeding from any particular party. They are entries evidently referring to some prospective act; yet so indefinite and uncertain in their nature as to be incapable of any specific title or denomination; and if it were possible to contend that they might be construed as

an original endowment, which it is submitted is impossible, it is obvious that the instrument would not be derived from the proper custody.

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3d, Because, supposing the said book to have been duly authenticated, and the entries therein from their nature to be legally admissible in evidence, such entries are not appropriate evidence with reference to the issue on the record; for the endowment of the vicarage so far from being a subject of dispute, or constituting a necessary part of the Respondent's proofs, is admitted by the very nature of the Appellant's own case; and as to that, which is the only point in issue, namely, the mode in which tithes are payable annually for Bagber farm, those entries cannot be received in evidence, although as to another point, if it were a matter in controversy, they might be considered as legal proof.

4th, Because those entries are not legal evidence as between the parties upon the present record; for they cannot be considered in the light of a public act, in which the world at large may be supposed to have borne a part, nor of an act to which the Appellant or any former owner of Bagber farm can be construed to have been a party. They seem to have been the unauthorized act of certain individuals, as against whom it may be conceded such entries would be evidence, but as against the Appellant, or in other words, the owner or occupier of Bagber farm, who had no participation or concern in their formation, nor any knowledge whatsoever of their existence, those entries, on the

June 10, 12, ground of their being *res inter alios acta*, are inad-
 13, 1816. missible in evidence.

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BACKNESS.—

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Sir S. Romilly and *Mr. Dauncey* at the bar contended (for the Appellant) that the Judge (Bailey) was mistaken in supposing that the entry as to the portions of the church of Sturminster was contemporaneous with the endowment; and if the entry was received in evidence on mistaken grounds, there ought to be a new trial, because it was impossible to say what effect this mistaken view of the subject might have had on the minds of the Jury, or what would have been the verdict if it had been clearly shown that the entry was not contemporaneous with the endowment. The endowment must have taken place previous to the year 1290, and these entries must have been made subsequent to the year 1333, or the 7th of Ed. III. as the preceding entry was of that date; so that it was manifest from the book itself, that the entries in question could not have been contemporaneous with the endowment. It was manifest also that the entries ought not to be received in evidence, for, supposing that the endowment itself might be read, if produced, this entry as to the portions assigned to the vicarage did not purport to be a copy nor an extract from either copy or original. But even the endowment itself would have been no evidence on this issue, as it was no question between the Rector and Vicar. If there had been never so many moduses, none of them would appear from the endowment, which would merely show the tithes as-

signed to the vicarage, without saying any thing as to how they were paid. Even as between the rector and vicar, this entry could have been no evidence; it was no diary of acts done at the time, and was accompanied by no act whatever. At any rate it was clearly *res inter alios acta* with respect to Bullen; and if such entries were admitted as evidence against third parties, the rector and vicar might make entries, cutting down all moduses at their pleasure. The only judgment given by the Court of Exchequer as to this book was that it came out of a proper custody, leaving the rest open. But it was left by Mr. Justice Bayley very strong to the Jury in this way, that the enumeration of the articles was indicative of the payment of the tithes in kind, and that the total value was of such a size, as to be inconsistent with the notion that so large a modus had existed so far back as the time of legal memory: so that this entry had a weight given to it which it did not deserve; and it was impossible to say that, without this, the verdict would have been as it was; for the opinion of the Jury might have been formed on this very document so left to them.

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Vid. Aveson,
v. Lord Kin-
naird, 6 East.
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Pell (*Serjt.*) and *Gifford* (for the Respondent). The whole weight of the cause was not laid by Mr. Justice Bayley on the Chartulary, for great stress was laid on the rate-paper which was in evidence on the second trial: though on the first, Mr. Justice Chambre had refused it, thinking that the other payments were not good evidence on this issue. If this payment was a modus, all the others must be moduses; and then it was a fair question

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for the Jury, whether so large a sum as 68*l.* could have been paid in lieu of the vicarial tithes of this parish so far back as the time of legal memory. There were other documents likewise to show that there could have been no such payment for this farm so far back as the time of legal memory. From the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, &c., it appeared incredible that the payment could have existed at that period. But the Chartulary was good evidence between these parties. This was clear law, that an entry or declaration made by a person against his own interest, was evidence between other persons who were neither parties nor privy to that entry or declaration—not, of course, in the person's life time, because then he might himself be called. *Roe, d. Brune v. Rawlings*, 7 East. 279.—*Higham v. Ridgway*, 10 East. 109; in which latter case an entry in a book by a man-midwife, of his having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, was held to be evidence as to the age of the child. So an attorney's book was evidence between other parties, *Warren, d. Webb v. Grenville*, 2 Str. 1298. A terrier was evidence against the Rector, though no party to it, *Illingworth v. Leigh*, 4 Gwill. 1615. These cases furnished a sufficient answer to the objection that the entries were *res inter alios acta*. To the same purport were the cases of *Stead v. Heaton*, 4 T. R. 669—and *Doe, d. Reece, v. Robson*, 15 East. 32; in the latter of which cases Lord Ellenborough (C. J.) said, "The ground upon which
" this evidence has been received is that there is a

"total absence of interest in the persons making the
 "entries to pervert the fact, and at the same time
 "a competency in them to know it." And per
 Bayley, (J.) "It has long been an established
 "principle of evidence that, if a party, who has
 "knowledge of the fact, make an entry of it,
 "whereby he charges himself, or discharges an-
 "other, upon whom he would otherwise have a
 "claim, such an entry is admissible evidence of
 "the fact, because it is against his own interest."
 The entries were made when the book was in the
 custody of the Abbot of Glastonbury, who was
 Rector of the church of Sturminster. The whole
 of the tithes belonged *de jure* to the Rector, and
 whatever he admitted to be due to the Vicar was
 against his interest; and, on the principle of the
 decisions, such entries were evidence as between
 third parties. The endowment itself would clearly
 have been admissible evidence, as in *Scott v. Smith*,
 1 Ves. Beam. 142. where M. R. admitted an en-
 dowment, and held that the endowment, being
 within legal memory, negatived the prescription.
 The Bishop's registry had been searched, and the
 endowment could not be found; and when the
 original was lost, any secondary evidence might be
 given—a copy, minutes, an extract, or evidence of
 one who had read it. It was not necessary to show
 that the entry was an exact copy: if it was a true
 account of the matter it was sufficient. *Underhill*
v. Durham, Freem. 509, 2 Gwill. 542.—*Greene*
v. Proude, 1 Mod. 117. If the entries gave a true
 account of the subject, it was no good objection to
 the admissibility of the evidence that the book con-

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* Fol. Ed.

Appdx. 138.

tained miscellaneous matters: *Moore v. Mayor of Hastings*, 10 State. Tri.* The account of the giants, &c., properly speaking, formed no part of the book. Such idle stories were often written by the monks on the blank leaves of Abbey books. The custody was clearly the proper one, as the Marquis of Bath possessed some of the lands which had belonged to the Abbey, and the possession of a person having such lands was sufficient; and the case must be argued as it would have been previous to the dissolution of the monasteries, and as if the book had come from the Abbey. And it was not only admissible, but material evidence, and so it had been considered by the Court of Exchequer, when that Court ordered a new trial; for the mere admissibility would have been no good ground for a new trial, if the book had contained nothing of consequence. But suppose this book out of the question, the other evidence was amply sufficient to support the verdict; and if so, the Court would not send the matter to a new trial; for the intent and object of an issue out of equity was to inform the conscience of the Court; and if the Court was

Vid. *Richards v. Symes*,
2 Atk. 319.

satisfied on the rest of the evidence that the verdict was right, there could be no good reason for sending the case to a new trial, though the objections to this book should appear to be well founded. *Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 155.—*Pemberton v. Pemberton*, 11 Ves. 52.

Sir S. Romilly (in reply). The doctrine contended for on the other side, with respect to these issues, would render the judgment of juries on the facts of no avail. The evidence for the modus was not slight,

as the payments had been proved to have been inva- June 12, 1816.
riably made for sixty years past, the period of limi-
tation of a writ of right; and it was difficult to
conceive how a farm modus could be proved in any
other way. The rate-paper could properly be evi-
dence only in as far as it related to the payment
made for this farm; and it would be unjust to raise
an inference from the other payments against the
Appellant on this issue. As to the book called a
Chartulary, they might as well have produced the
Chronicles of Thomas Herne; and, besides, no
evidence was given of a search for the endowment
in the Augmentation Office.—(*Gifford*. That was
not before made a ground of objection).

TITHES.—
MODUS.—
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Lord Eldon (C.) Considering that this is a case
of great consequence, and that it is impossible for
me, during the few minutes that remain before the
time when the Judges are to attend on very im-
portant business,* to address your Lordships so
fully on this case as I wish to do, I shall say no-
thing as to the affirmance or disaffirmance of the
judgment at this moment. If the entries in this
book have been properly received in evidence, and
their effect accurately stated and justly construed
(as I know of no noble Lord who thinks the verdict
wrong in that view of the case), then the cause may
be decided in that way. If the book has not been
properly received, then there may be other impor-
tant matters to be considered.

* *Vid. Doe,*
d. Oxenden,
v. Chichester,
ante, p. 66—
91.

I understand that it was determined below, both
on the first hearing and on re-hearing, that these
issues ought to be directed; and considering that
new trials were afterwards twice applied for, and

Whether it
was right to
have origi-
nally directed
any issue in
this case.

June 12, 1816. that on the first application; all the Judges; and on the second, all, except Baron Richards, I think,

TITHES.—

MODUS.—

RAKENESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.

were of opinion that the directing of the issues at first in this case was right; it is difficult to say here, now, that to have directed these issues originally was improper; and I should not be disposed to say any thing on that point, without looking at the record and the evidence, and the whole proceedings in the Exchequer. But I have no

A Court of Equity may itself decide on facts, without the assistance of a Jury, though, in the exercise of its judicial discretion, it does often call for that assistance: but it is not bound to do so; and this is as clear in tithe causes as in others.

difficulty in saying, after forty years' experience, that a Court of Equity has a right itself to determine questions of fact without the assistance of a Jury. A Court of Equity may, and often does, in the exercise of its judicial discretion, call for the assistance of a verdict by a Jury. But if it can, to its own satisfaction, itself decide upon the evidence, it is not bound to send the matter to be tried by a Jury. This is as clear in tithe as in other causes; and if the original decree, so far as it directed the issues, had been appealed from, the weight of evidence appears to be so much on one side that I should have found it difficult to say that any issue ought in this case to have been granted. But issues were directed, and we must now take it that this was properly done.

Warden and Minor Canons of St. Paul's v. Morris. 9 Ves. 155.

Where on the trial of an issue out of Equity, evidence is improperly rejected, if the Court is satis-

With respect to the case of the Warden and Minor Canons of St. Paul's, that case was decided not merely by the humble individual who now addresses you, but also by this House. The case was brought here by appeal, and this House, well assisted at the time, concurred in this doctrine—that where, on trial of an issue out of a Court of Equity, evidence is improperly rejected, if in looking at that evidence the Court is satisfied that, though it

had been received, it ought not to have produced a different verdict; and that if the verdict had been the other way, that verdict ought not to stand; the refusal to grant a new trial is in the proper course of proceeding. I thought that, in the case of the Minor Canons of St. Paul's, there existed no good reason to direct an issue at all. But an issue had been there directed; and it was considered that it was properly done, as the order had not been appealed from. Lord Kenyon disposed of it very speedily, there being, as he said, nothing to try. Another issue in the same case was tried at bar in the Exchequer, and some material evidence was offered. Three Judges were of opinion that this evidence ought not to be received; and one (Baron Graham) thought that it ought to be admitted; and upon that ground a motion was made before me for a new trial. I declared that I thought Baron Graham in the right, and that I should have admitted the evidence; but, considering the nature of the functions of a Court of Equity, and the principle upon which it calls for the assistance of a Jury, the object being to satisfy the conscience of the Court, I could not agree to send the case again to a Jury, when, even though the evidence were admitted, the verdict ought not in my opinion to be different; and when, if it should be so, the conscience of the Court would not only not be satisfied, but would on the contrary be dissatisfied. And then it becomes a matter of nice distinction—if no new trial ought to be granted, though evidence has been rejected which ought to have been received, where, if that evidence had not been rejected but admitted, the court is of opinion that the verdict should be

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DENCE.—

NEW TRIAL.

fied that,

though it had

been received,

it ought not to

have produced

a different ver-

dict; the re-

fusal to grant a

new trial is in

the proper

course of pro-

ceeding. This

doctrine

sanctioned in

Doct. Proc.

9 Ves. 155.

Issue there di-

rected per

Lord Lough-

borough.

June 12, 1816. the same; it becomes a matter of nice distinction then, to say, that because evidence has been admitted which ought to have been rejected, a new trial ought to be granted, though the Court should be of opinion that, even if that evidence had not been received but rejected, the conclusion ought to be the same upon the other evidence.

TITHES.—

MODUS.—

RANKNESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.

evidence which ought to have been rejected a new trial ought to be granted, though the verdict should be right independent of that evidence.

It is indisputably clear that in tithe causes, as well as others, a Court of Equity may decide without sending an issue to a Jury; the Court in each case exercising a sound discretion whether it will do so or not.

First point, that the Chartulary was properly admitted in evidence.

June 13, 1816. Judgment. Chartulary.

I have said so much to-day, because I take it to be indisputably clear that these tithe causes, as well as others, may be decided by a Court of Equity, without directing issues; the Court of course exercising a sound discretion in each particular case, as to whether in that case an issue ought or ought not to be sent to a jury. But if there is any where a notion that a Court of Equity is bound on all questions of fact to direct an issue or issues, I say that it is contradicted by my experience, and by the administration of the law for a long series of years.

If your Lordships should determine the question on the first point, I am anxious to protect this decision against an inference that we decide any thing as to what a Court of Equity ought to do if the evidence had been rejected.

Lord Redesdale (after stating the case). The book, which was produced as the Chartulary or Ledger-book of the Abbey of Glastonbury, was of this kind. The steward of the Marquis of Bath proved that it had been kept in the muniment room of the Marquis, who was proprietor of certain lands which had formerly belonged to the Abbey; and it is well known such books are sometimes found in the possession of private individuals, who have got lands which had belonged to the Abbey. The proper cus-

tody perhaps was the Augmentation Office. But ^{June 13, 1816.} the fact is, that these Chartularies, or Ledger-books, have in some instances got into the hands of private persons, instead of being kept in the Augmentation Office.

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MODUS.—
RANKNESS.—
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NEW TRIAL.
Objections to
the Chartu-
lary.

The objections that were made to the reading of the entries in this book were of three descriptions:—1st, that the custody was not the proper one, an objection however which seems not to have been pressed at the last trial; 2d, that the entries did not contain evidence in itself proper to be received; and 3d, that, if they did, the matter was *res inter alios acta*, with which the owner of Bagber farm had nothing to do.

With respect to the book itself, many observations were made upon it as containing matter not at all connected with the possessions of the Abbey. But, as far as I can judge from this writing, there are, from the sixteenth page for a considerable extent into the book, various entries with which the Abbey was concerned, and such as are usually found in this sort of books belonging to Abbeys; for the monks were in the habit of transcribing instruments which concerned the Abbeys, and also of transcribing public instruments as far as they related to their own interests. It is that kind of book therefore in which ancient deeds and instruments are usually transcribed for the sake of reference and preservation, as is the custom in families which have a muniment room.

Nature and de-
scription of
the book.

Search was made in the Bishop's registry to ascertain whether an endowment of the vicarage existed, but none was found. Then this book was produced, and it contains entries which appear to

The entries.

June 13, 1816.

TITHES.—

MODUS.—

RANKNESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.

Stat. 15 Rich.

II. cap. 6.

be transcripts of two instruments: 1st, the ordinance of the Bishop of Salisbury for the appropriation of the church to the Abbey. Now it was expressly required by the statute 15 Richard II. cap. 6. that, on the appropriation of churches, the diocesan should ordain that the Vicar be well and sufficiently endowed, and that statute I take to have been in affirmance of a practice before existing, and that it was, previous to that statute, required that in cases of appropriation the Vicar should be properly endowed, and that it was the duty of the ordinary to see that this was done. The instrument of which this seems to be a copy, is the ordinance of the Bishop on the appropriation of the church to the Abbey of Glastonbury, in which it was provided that the endowment should be ten marks at least. "*quæ valeat annis singulis ad firmam tradi pro decem marcis ad minus, &c.*" This is very important if it be an authentic copy of an authentic instrument, as the next instrument is conformable to it, and is entitled "*Ordinacio Vicarie de Stur-*" "*minstre.*" But it has been said that this title was not originally in the book, as it is written in a very small compass. But in looking over the book I find all the titles put in the same way, and the matter is not at any rate of much consequence. This entry begins with the words "*Porciones Ecclesiæ de Sturmynstre Vicarie Ordinande in eadem perpetuis temporibus duratur mansum cum gar-*" "*dino, &c.*" and then expresses the several articles. That entry is in conformity to the preceding instrument; for, if an allowance was directed, on the appropriation, as a provision for the Vicar, and that was not made, the law was that the appropriation

The entries conformable to each other.

was void ; and though at this distance of time it is to be presumed that every thing was rightly done, yet at that time, unless the vicarage was endowed as appointed by the Bishop's ordinance, the appropriation was void ; and it was important for them, therefore, to preserve the ordination, and the endowment making provision for the Vicar in terms of the ordinance for the appropriation. Then these entries appeared to be copies of authentic and contemporaneous instruments, the one immediately following and corresponding to the other. So the several articles were enumerated, and the value of each making the annual value of the vicarage 9*l*. 12*s*. 5½*d*. after all charges deducted.

The question is whether this copy so produced was properly admitted in evidence ; and first it was made a question whether the original, if produced, would have been admissible evidence. Your Lordships observe that this evidence was offered to rebut a presumption which the Jury were called upon to draw from the Plaintiff's evidence, that this was an immemorial payment. To rebut that, the Vicar produces evidence to show that it was impossible to draw that presumption, and that the Jury ought to presume the other way ; because, from what appeared to be the value of the whole at three several times, and the value of one parcel at another time, this sum of 5*l*. 3*s*. 4*d*. for Bagber farm was so much beyond what it could possibly have been in the time of Richard I., that it was impossible it could be an immemorial payment. Upon the principle of some of the arguments for the Appellant, no evidence could ever be given to show that a modus was too rank. You never can prove directly the

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TITHES.—
MODUS.—
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DENCE.—
NEW TRIAL.

And copies of
authentic con-
temporaneous
instruments.

Evidence with
reference to
the rankness of
an alleged
modus.

June 12, 1816. value of the several articles in the time of Richard I.

TITHES.—

MODUS.—

RANKNESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.

Res inter alios
acta.

Taxation.

Survey, 26.
Hen. VIII.

Ad quod dam-
num.

The original
instruments, of
which the en-
tries are co-
pies, would
have been evi-
dence.

You can only show what has been reputed to be the value; and in questions of reputation, *res inter alios acta* is no objection, and so it seems to be admitted in other parts of the case. The taxation of Pope Nicholas was *res inter alios acta*. The occupier of Bagber farm had nothing to do with it. But it is evidence of the value of the vicarage as estimated for the purposes of that taxation. So the survey of 28 Henry VIII. is *res inter alios acta*; but these surveys are constantly admitted in evidence, not as an accurate account of the precise value, but as an estimate of the value from which the Jury may draw an inference. So it is with regard to the inquisition *ad quod damnum*, in the 37th of Edward III. The occupier of Bagber farm had no concern with it; but it was admitted to show that at that time the tithes were estimated to be of such a particular value, from which the Jury might draw their inference.

I take it then the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, the survey, and a variety of similar evidence, such as old leases of other lands, from which the Jury may draw their inference. They are evidence of reputation, as to matters where no other evidence can be had, to rebut the presumption raised for the other side; for it is merely a presumption.

This being the view I have of the matter, the only question then is whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries could

not be evidence. But search has been made, and the originals cannot be found; and, as a great authority observes, if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall do constant injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances; and secondary evidence is then admitted to raise a presumption or inference where no direct evidence can be had. This then is the next best evidence; and perhaps evidence still more inferior might have been admitted if this could not have been produced. This, however, appears to be the best after the originals; for what is it? These two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the Abbey, because it was important for the interests of the Abbey that the instruments should be preserved; and for the same reason it might be presumed that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept. The second instrument was particularly important to the Abbey as following the appropriation, and being evidence to show that the vicarage had been endowed to the extent required, and that the appropriation was consequently good and not void. It was material for the Abbey also that the values should be correct, and especially that they should be high enough, as it was necessary that the endowment should be of the value of ten marks at least; and is it credible then that, if this one little farm paid the sum of 5*l.* 3*s.* 4*d.*, the circumstance,

June 13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

And, as the originals cannot be found, the copies in the book are evidence.

The entries are the next best evidence after the originals.

June 18, 1816. when they were valuing the whole vicarage tithes, should not have been mentioned in this instrument?

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

The entries are admissible and material evidence.

Entry contemporaneous with the endowment.

This therefore is in my opinion evidence proper to be received, and decisive on the subject.

It has been objected that the Judge stated to the Jury that the latter entry was contemporaneous with the endowment. Supposing that to be a ground of objection, it is little better than cavilling about words; for the meaning was that it was made about the same time. But even critically speaking I should be of opinion that it was made at the same time, and preceded the actual appointment of the Vicar, for the words are, portions, &c. assigned to the vicarage *to be ordained*.

But, though the Chartulary were rejected, the other evidence abundantly sufficient to support the verdict.

Design of issues out of Equity is to inform the conscience of the Court.

But supposing the objection to the admission of the entries in this book as evidence to be well founded, what is to be done on the application for a new trial? The design of the trial is to inform the conscience of the Court, and any special matter ought to be indorsed on the *postea*. It is not a verdict to be put on record for judgment, for none is given upon it; but it is to inform the conscience of the Court, and that is the right way of considering it. Then, when I look at what the other evidence is, it appears to me amply sufficient to warrant the verdict. The Appellant's evidence is the slightest I ever remember to have seen in such a case. The evidence was, that all the parish was covered by these immemorial payments to the amount of about 70*l.* a year in the whole; the very slightest presumption of immemorial payment. To rebut that, there is the taxation of Pope Nicholas, the writ of *ad quod damnum*, and inquisition thereon, in the 37th Edward III., and the survey of

26 Henry VIH., all of which must be founded on the grossest error if this be a true immemorial payment. The inference is that this could not be an immemorial payment ; and the verdict is therefore right, though the entries in this book had been improperly admitted. The conscience of the Court then is sufficiently informed, and there appears no good reason to grant a new trial ; and in my opinion, therefore, the judgment ought to be *affirmed*.

I have gone more at length into the case than usual, as the question is of great importance with reference to the trial of cases of the same nature. I am satisfied that the book called the *Chartulary* was properly received in evidence, and that, if it were not so, the verdict is still right, and that the Court below was therefore justified in refusing to send the matter to another trial.

June 18, 1816.
TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

And, though the *Chartulary* were out of the question, the conscience of the Court is sufficiently informed by the other evidence, and there is therefore no good reason for another trial.

Lord Eldon (C.) I shall comprise what I have at present to say upon this case in a narrow compass. The suit was instituted twelve years ago, and the question is whether an issue shall for the third time be directed ; there being already one verdict for the Appellant establishing the *modus*, and another for the Respondent against the *modus*. But though this cause has endured twelve years already, yet, if it be necessary, regard being had to the course of a Court of Equity in these cases, we must subject the parties to what we know belongs to a third trial.

This was a bill filed in the Court of Exchequer by the Vicar of Sturminster Newton, for an account and payment of tithes in kind ; and there is this singularity in the case, that all the lands in the

June 13, 1816.

TITHES.—

MODUS.—

RANKNESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.

parish, except the Common Meads, if the defence can be supported, are covered with moduses, the whole of them amounting to 68*l.*, being contracts for valuable consideration so long ago as the time of Richard I., and that too exclusive of the tithe of corn and grain; and a Jury was to be called upon to conclude that the tithes of this parish, excluding those of corn and grain, amounted, in pecuniary value, in the time of Richard I., to 68*l.* a year. We know what was the value of money at that time; and then consider that the Rector was to have the tithe of corn and grain; and if so, I think there is hardly any clergyman who would not wish at this day, I mean if there are no moduses, to have the living of Sturminster Newton; for if the tithes of that parish were of such value then, what must their value be now?

The Defendants however stated these moduses, and that they were ready to pay them. It was proved (so it is stated in the Judge's notes) that for a long time tithe had not been paid for this farm *qua* tithes, but certain payments in money; and that no tithe in kind had been paid during that period. Then the rate paper was given in evidence, which Justice Chambre had refused at the first trial, and it was contended that the only use that could be made of it was this, not that any inference could legally be drawn from the whole as to any particular place, but that, *reddendo singula singulis*, what was applicable to farm A. should alone be read as to farm A., and what was applicable to farm B. should alone be read as to farm B., and so on. Now it appears to me that this is clear evidence with quite a different application. In the

The rate-paper evidence in this view, that all were immemorial payments, or that none were so.

Warden and
Canons of St.
Paul's v. Mor-
ris, 9 Ves.
155.

case of the Warden and Minor Canons of St. Paul's June 13, 1816.
 a book of rates containing a variety of payments
 was produced, and was taken as evidence in this
 view, that it must be contended that all of them
 were customary payments, or that it might rationally
 be inferred that none were so. The rate-book then
 seems to me not merely good, but most material
 evidence, upon this issue.

TITHES.—
 MODUS.—
 RANKNESS.—
 ISSUE.—EVIDENCE.—
 NEW TRIAL.
 The evidence independent of the Chartulary is sufficient to satisfy a Court of Equity, and no trial at all need have been directed.

Now on considering, in addition to the rate-paper, the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, and the survey, 26 Hen. VIII., I confess I am surprised that any issue at all should have been directed, as I can now state that it appears to me that, independent of this Chartulary, there is demonstrative evidence that this is no *modus*; and it is not the principle of a Court of Equity, because there is a question of fact which may be tried by a Jury, on that account merely, to send it to be so tried. That is not the principle of a Court of Equity.

It is not the principle of a Court of Equity, merely because there is a question of fact which may be tried by a Jury, to send it to be so tried.

Mr. Justice Chambre, at the first trial, thought that neither the rate-book nor the Chartulary ought to be received. On a motion for a new trial the Court was of opinion that the rate-book and Chartulary ought to be received in evidence; and it was made a question at the bar, as to the Chartulary, whether the judgment of the Court of Exchequer was merely that it was competent or admissible evidence, or whether the judgment was, that it was not only admissible, but that it ought also to have some effect. If I were sitting to decide whether this book was competent evidence, and were of opinion that, though competent, it ought to have

June 13, 1816. no effect, I could never think of sending it to a jury if satisfied that the direction to the jury ought to be that, after looking at the book, they were to shut it again as if they had never seen it; and if there was any difference of opinion on that point among the Judges below, I agree with the majority that it must have some effect; though they said, very properly, that they could not appreciate what effect it ought to have on the minds of the Jury, because that might depend on circumstances, and on the nature and import of the whole evidence.

TITLES.—
MODUS.—
BANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

If on the trial of an issue out of Equity the verdict is right, though there may have been miscarriage in the conduct of the trial, that is no good reason for directing a new trial.

The design of issues out of Equity often misunderstood at *Nisi prius*.

Then the cause was sent to another trial, and your Lordships will recollect that this was to satisfy the conscience of the Court. I am of opinion that no issue ought to have been directed, as the evidence appears to me completely satisfactory without any issue. It is impossible this could have been a payment at, and ever since, the time of Richard I.; and I cannot admit that, consistently with my oath, I ought, if a verdict is right, either to direct or refuse a new trial by reason of any miscarriage in the conduct of the previous trial. Speaking in the hearing of persons on the other side of the bar for whom I have the highest respect, I must say, that in nine cases out of ten the object of these issues is misunderstood. We send issues out of the Courts of Equity, and they proceed upon them as they usually do at trials at *nisi-prius*, and think that sufficient on issues out of Courts of Equity. For instance, in cases of wills, where the subject in question may be of the greatest consequence, we send the matter for trial upon an issue, *devisavit vel non*, and a Court of Equity is not satisfied unless

the will is proved by the three subscribing witnesses. June 13, 1816. They however usually call only one witness, who proves the signing by the testator, and the attestation of himself and the others, in the testator's presence, leaving it to the other side, if they think proper, to call the other witnesses, for reasons understood among themselves; and then it has been said that the issue must be tried over again, which shows on what foundation the thing proceeds; and that issues out of Courts of Equity depend on different reasons, and lead to different conclusions, from those of issues in trials between man and man.

TITLES.—
MODUS.—
RANKINGS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.
Vid. Doe v. Smith, 1 Eq. N. P. C. Longford, v. Eyre. 1 P. Wms. 741.— Bul. N. P.

I beg leave here again to mention the case of the 9 Ves. 155. Warden and Minor Canons of St. Paul's. An issue was there directed which was first tried in the King's Bench, and afterwards in the Exchequer at bar. Material evidence was offered, and three Judges were of opinion that it ought not to be received; but Baron Graham thought that it ought, and on that ground they moved for a new trial. I looked over the whole of the proceedings, from the beginning to the end, to see whether the verdict ought to have been different if the evidence had been received; for it would be curious if you were to send a case for trial to give an opportunity for admitting evidence, when, if that evidence were taken, and a different verdict given in consequence, your conscience would not thereby be satisfied but dissatisfied. I declared my opinion that Baron Graham was right, and the other Judges wrong: but I further said, that, even if the evidence had been received, it ought not to have produced a different

June 13, 1816. verdict: and that, if a different verdict had been given, I would have granted a new trial. Such

TITHES.—

MODUS.—

RANKNESS.—

ISSUE.—EVI-

DENCE.—

NEW TRIAL.—

Though on the trial of an issue out of Equity, evidence has been rejected which ought to have been received, if the Court is satisfied that the verdict is right, and that though the rejected evidence had been admitted it ought not to have produced a different verdict; the Court will not grant a new trial merely because of the rejection of evidence which ought to have been admitted.

And, on the same principle, though evidence has been admitted which ought to have been rejected, if the verdict is good upon other evidence, the Court will not

being my opinion, I could not grant a new trial merely because evidence had been rejected, which, if received, ought to have made no difference in the conclusion. That however does not rest merely on my opinion, but on that of this House, well assisted at the time when that case came before it on appeal.

This House then having so determined that, though evidence had been rejected which ought to have been received, yet if you were satisfied on all the evidence, that, if that evidence which was rejected had been admitted, the verdict ought still to have been the same, you ought not to send the matter to another trial.—Such being the opinion and judgment of this House in that case, it is difficult to say that, in this case, merely because some evidence may have been received which ought not to have been admitted, though the verdict is good upon the rest of the evidence independent of that evidence which ought, as is contended, to have been rejected; that, in this case so put, you ought to grant a new trial. My own opinion clearly is, that this verdict is good upon the rest of the evidence, and that therefore, even upon the supposition that this disputed evidence has been improperly received, no new trial ought to be granted.

Then have the entries in this book been properly received in evidence? It has been said that even the endowment itself, if it had been produced, ought not to have been received. Not received, my Lords!

By what evidence can you negative such an issue as this? We produce general evidence of the value of the lands, and show that the value of the whole lands was not equal to your alleged tenth at the time of Richard I. On what principle was the taxation of Pope Nicholas received? On what principle the inquisition in the 37th of Edward III.? On what principle the survey in 26 Henry VIII.? On what, but this, that, from the nature of such issues, they must be met by this general evidence of value, and that evidence is demonstrative that the payment in this case could not be a real modus; because, upon that supposition, your tenth must be of greater value than that tenth and the other nine parts together, which is impossible.

June 13, 1816.

TITHES.—
MODUS.—
RANKNESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

grant a new trial, merely because some evidence had been admitted, which ought to have been rejected.

The endowment itself would have been good evidence.

Then as to the custody in which the book was found, it is the natural and proper custody for such a book; for, as to this purpose, it is the custody of the Abbey of Glastonbury. I do not trouble your Lordships about the question, whether the Judge was right in saying that this entry was contemporaneous with the endowment. The entry appears to be a transcript of the original instrument, and, within the scope and principle of all the authorities, ought to be received as evidence. The result is clear, and on this ground alone the new trial might be refused; and I should have thought it unnecessary to touch upon the other parts of the case, had it not appeared to me in the course of the argument, that notions were entertained respecting the functions of a Court of Equity, which rendered it proper not to dispose of this case without taking

Custody proper.

The entries in the Chartulary were properly admitted in evidence, and on that ground alone the new trial might be refused.

June 18, 1816. *care that your Lordships' decision, if it should rest on this point, should not prejudice the other points in the cause.*

TITLES.—
MODUS.—
RAKENESS.—
ISSUE.—EVI-
DENCE.—
NEW TRIAL.

Order refusing
the new trial
affirmed.

Appeal dismissed, and the order complained of *affirmed.*

Agent for Appellants, VANDERZEEM,

Agent for Respondent, FORSTER, COOKE, and FREER.

ENGLAND.

ERROR, FROM THE COURT OF KING'S BENCH.

BENSON—*Plaintiff in Error.*

WHITE—*Defendant in Error.*

May 17, 1816. *ACTION* by indorsee of a bill of exchange against the acceptor.—Declaration states in first count, that payment was demanded at the place where the bill was made payable, without averring that payment was *refused*; and, after other counts, declaration states in conclusion, that the acceptor had not paid any of the sums in the declaration mentioned. Judgment entered up generally on the whole of the declaration, and error brought for want of averment in the first count of a *refusal* to pay. Held to be no error in this case, and Judgment *affirmed*.—(Vid. *Butterworth v. Le Despenser*, 3 Maule. Sel. 150.)

BILL OF EX-
CHANGE.—
ERROR.

Action.

THIS was an action brought in the Court of King's Bench by the Defendant in error, as indorsee of a bill of exchange, for the sum of 500*l.*, to recover

against the Plaintiff in error, as the acceptor thereof, ^{May 17, 1816.} the amount of the said Bill of Exchange.

The first count of the declaration stated, that one John Thompson, on January 1, 1814, drew the bill in question on the Plaintiff in error, payable nine months after date, to the order of the drawer ; that the Plaintiff in error accepted the bill, payable at the house of *Butler Brothers, Esq. Broad-Street, London.* It then averred that John Thompson, the drawer, indorsed the bill to the Defendant in error, and delivered the same so indorsed to the Defendant in error, and that, by reason of the premises, and by force of the usage and custom of merchants, the Plaintiff in error became liable to pay to the Defendant in error the money in the said bill specified, according to the tenor and effect of the said bill of exchange, and of *his said acceptance thereof*, and of the said indorsement so made thereon as aforesaid, and a promise to pay the same according to the tenor and effect of said bill of exchange, *and of his said acceptance thereof*, and of the said indorsement thereon as aforesaid. It then averred that afterwards, and when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the fourth of April, in the year aforesaid, the said bill of exchange, so accepted and indorsed as aforesaid, was shown and presented for payment at the place where the same was made payable as foresaid, and payment thereof was then and there *demanded*, without averring that payment was *refused*, according to the tenor and effect of the said bill of exchange, and of the said acceptance thereof, and of the said indorsement so made

BILL OF EX-
CHANGE.—
ERROR.
Declaration.

May 17, 1816. thereon as aforesaid. And, after other counts, the conclusion of the declaration stated, that the Plaintiff in error had not paid any of the sums of money in the declaration mentioned.

**BILL OF EX-
CHANGE.—
ERROR.**

Judgment.

The Defendant in error obtained, and entered up, a general judgment on the whole declaration. On this judgment the Plaintiff in error brought his writ of error, and assigned, in addition to the common errors, the following special errors:—1st, That it was stated and alleged that the bill of exchange, in the first count mentioned, was, by and according to the tenor of the acceptance thereof, made payable at a particular place, namely, the house or shop of Butler Brothers, Esq. in Broad Street; and yet it is not averred that payment thereof was ever refused at the said house or shop of the said Butler Brothers, or by the said Butler Brothers, or by the Plaintiff in error. 2dly, That when a bill of exchange is accepted payable at a particular place, the acceptor cannot by law be sued or made liable, unless such bill be presented at the place where it is made payable, and payment thereof be refused at such place; yet that it was stated in the first count that the bill of exchange therein mentioned was accepted payable at a particular place, and that the same was indorsed to the Defendant in error, after such acceptance, whereby he must by law be deemed to have adopted such qualified acceptance, and bound himself to the terms thereof; yet it was not stated that payment of the bill was ever refused at the place where it was made payable. 3dly, That where a previous demand and a previous refusal are necessary before a complete cause of action can accrue, a

Errors.

mere demand without a refusal cannot by law give ^{May 17, 1816.} or create a cause of action ; and although, in order to afford and give a complete cause of action against the Plaintiff in error, in respect of the said bill of exchange, a refusal of payment of the said bill of exchange at the place where the same was made payable was essential, there was no averment that the bill of exchange in question was refused payment at the place where it was made payable, or by the persons to whom it was made payable, or by the Plaintiff in error.—The Defendant in error replied that there was no error.

BILL OF EX-
CHANGE.—
ERROR.

Mr. Barrow for Plaintiff in error; *Mr. Foljambe* for Defendant in error.

The reasons given for reversing the judgment were these :—

1st, That although a person is not bound to receive a bill of exchange, accepted payable at a particular place, or by particular persons, other than the drawee of such bill ; yet if he does so receive it, he adopts such special acceptance as part of the contract, and is bound by all the consequences of such special acceptance ; and that the Defendant in error having taken the bill in question with such special acceptance was bound by it.

Reasons for re-
versing the
judgment.

2dly, That the drawee of a bill of exchange is not bound to accept it generally : he may restrict his acceptance ; and by accepting it payable at the house or shop of a particular person or particular persons, he refuses to accept it generally, so as to make himself liable to pay it anywhere, but engrafts

May 17, 1816. upon it as a condition, precedent to his being called upon to pay it, that it shall be presented for payment at the place where it is so made payable, and be refused payment at such place, or by the persons by whom it is made payable. And the person taking a bill with such special acceptance is bound to present it for payment at the place where it is so made payable, and to aver and prove that he had done so, and that payment was refused before he can sue the acceptor.

BILL OF EX-
CHANGE.—
ERROR.

3dly, That the practice of accepting bills payable at a banking-house, or at some particular place, or by some persons other than the drawees, has of late years become almost universal. That it is a great convenience to both holder and acceptor: to the holder, because, by having a bill made payable at a house of business, he is certain of finding some person who will give him an answer whether the bill be paid or not, without being under the necessity of calling frequently; and to the acceptor, because it facilitates the keeping accounts, and if he should have occasion to leave his residence, his acceptance may be paid in his absence.

4thly, That in cases of such special acceptances it is almost uniformly the fact that they are made payable by the acceptors' bankers or agents, and that consequently there must be a refusal by such bankers or agents to pay the bill, before the acceptor can be called upon. The averment that a demand was made does not necessarily imply a refusal. The party may not wait to receive an answer. Suppose the case, which very frequently happens,

that a man has nearly or entirely overdrawn his account at his banker's; and a bill accepted by him, and made payable at such bankers', is presented for payment, some time must be allowed for the cash clerk to consult the principals whether they will honour the acceptance. But the person presenting the bill does not think proper to wait. In this case there would be a demand, but no refusal; because the bankers might think proper, notwithstanding the acceptors' account was overdrawn, to give him further credit. And yet such a case would come entirely within the averments of the present declaration, which merely avers a demand, but no refusal. Again, payment of the bill might be demanded of a person who had no authority to give an answer. It would leave it in the power of a malevolent man to blast the credit of a merchant by merely demanding payment without waiting for an answer. And as the Plaintiff is not bound to prove more than he states in pleading, the party under the declaration in this count need only prove the demand, and it opens a door to fraud, by allowing a person to swear only to the latter.

5thly, Because it would be a most serious grievance, if the acceptor of a bill of exchange, who has accepted it payable at a particular place, and on the faith of its being presented for payment, when due, at such place, should have left funds at that particular place to pay it, and may have left his residence on business, might be arrested, at any place, at any distance from home, and at a time when he might not have any funds about him to take up such bill.

May 17, 1816.

BILL OF EX-
CHANGE.—
ERROR.

May 17, 1816.

BILL OF
EXCHANGE.—
ERROR.

6thly, Because, where a party is only liable on the default of another, there must be an actual default by a refusal by that other person to do the act required, before the party can be called upon to make good such default; but it does not appear that there was any default by Butler Brothers, at whose house the bill in question was made payable. And the Plaintiff in error was not liable to be sued, unless there was a refusal to pay the bill in question, by or at the house of Butler Brothers.

Reasons for
affirming the
judgment.
Vid. Butter-
worth v. Le
Despenser,
3 Maul. Sel.
150.

It was not thought necessary to hear the Defendant in error's counsel, but the reasons given in the case for affirming the judgment were these:—

1st, That the first count of the said declaration does state and aver that, at the time when the bill of exchange became due and payable, it was shown and presented for payment at the place at which the same was made payable, and payment thereof was then and there demanded according to the tenor and effect of the said bill of exchange, and of the acceptance thereof and the indorsement thereon; and the conclusion of the said declaration states that the said Plaintiff in error hath not paid any of the sums of money in the said declaration mentioned, and consequently that he has not paid the bill according to his promise and undertaking.

2dly, That it is not necessary to aver that any refusal to pay the bill was made by the persons at whose house or shop the same was made payable, because the acceptance of the Plaintiff in error did not impose upon such persons any legal obligation to pay the said bill; and that the tenor of the acceptance is not that the persons at whose house or

shop the bill was made payable would pay the same, May 17, 1816.
 but that the Plaintiff in error would himself pay the
 amount of the bill at that house or shop.

BILL OF EX-
 CHANGE.—
 ERROR.

Judgment *affirmed*, with 134*l*. costs.

May 17, 1816.
 Judgment.

Agent for Plaintiff in error, BARROW.

Agents for Defendant in error, WHITE and DOWNES.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HIGGINS—*Appellant*.

LIVINGSTONE and others—*Respondents*.

CERTAIN of the trustees under an act of parliament for April 4, 1814.
 making a road, the fund provided by the act being neither July 1, 1816.
 sufficient nor available for the object until the completion
 of the road, raise money on their personal credit to carry
 on the work, and afterwards bring an action against the
 other trustees who had attended any of the meetings for
 payment of an equal proportion each of the whole expense
 of the road, or at least for a proportion of the expense au-
 thorized at the meeting or meetings which they attended.
 Held at first by the Court of Session that the mere fact of
 presence at meetings did constitute a *prima facie* ground
 of personal liability, and that the *onus* lay on the Defenders
 to show, if they could, facts and circumstances exempting
 them from that personal liability. But on an appeal to,
 and a remit by, the House of Lords, held that the mere
 fact of presence at meetings did not constitute a *prima*
facie ground of personal liability, and that the *onus* lay
 upon the Pursuers to show acts beyond mere attendance
 done by the Defenders to render them personally liable;
 and therefore the defences of those trustees, against whom

ROAD TRUS-
 TEES.—PER-
 SONAL LIAB-
 ILITY.

April 4, 1814.
July 1, 1816.

ROAD TRUS-
TEES—PER-
SONAL LIAB-
ILITY.

nothing was alleged and proved except the mere fact of presence at meetings were sustained; but as to those trustees who signed contracts, they were held personally liable for a proportion of the expense of such contracts as they signed; and this judgment affirmed in Dom. Proc.

Dicente Lord Eldon, (C.) That when trustees confined themselves to the act of parliament and the application of the parliamentary funds, they were not personally liable; but that this also rested on strong principle, that as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, and shall be bound to provide funds to pay the contractors.

Road act,
1792.

IN 1792, an act of parliament was passed for making a new road from Edinburgh to Glasgow, by Bathgate and Airdrie, and the principal proprietors of land in those parishes of the counties of Linlithgow and Lanark, through which the road was to pass, together with the provosts or chief magistrates of the cities of Edinburgh, Glasgow, and Burgh of Linlithgow, and sheriffs depute of the counties of Linlithgow, Lanark, and Edinburgh, were nominated trustees for carrying the act into execution. The trustees were authorized to hold their first meeting on the first Saturday of June 1792, and half yearly meetings, at which all orders for issuing or borrowing money, for assigning the tolls in security, and for erecting side bars, were to be given. The trustees, or any five or more of them, or persons appointed by any five or more of them, were empowered to levy certain tolls and duties.

Subscription,
3650*l.*

Some proprietors more immediately interested in the object of the act had subscribed a sum of 3650*l.*

towards carrying it into execution; of which sum, April 4, 1814.
 after the expenses of obtaining the act of parlia- July 1, 1816.
 ment had been defrayed, 3000*l.* remained applica- ROAD TRUS-
 ble to the purposes of the road, and the trustees TEES.—PER-
 were empowered to raise this money from the sub- SONAL LIAB-
 scribers, their heirs, executors, and administrators; LITY.
 the same to be paid out of, and until paid to remain
 a lien upon, the tolls and duties. The trustees were Power to bor-
 also empowered to borrow 10,000*l.* on the security row 10,000*l.*
 of the tolls; to enter into contracts for making and on security of
 repairing the road, and to assign the proper powers the tolls.
 and a proportion of the tolls to the contractors.
 Private parties were to be recompensed for the
 ground taken for the road, out of the tolls or the
 money borrowed on the credit thereof; and the
 money raised by toll, and borrowed as aforesaid, was
 to be applied first, in defraying the charges of ob-
 taining the act; then in defraying the expenses of
 erecting toll-houses and turnpike gates, and of col-
 lecting the tolls, of repairing the roads, and of ma-
 nagement; after which the money was to be applied
 in paying the interest of the debt, and extinction of
 the principal, &c.

From previous estimates it had been concluded
 that the sum of 3650*l.* subscribed, and the 10,000*l.*
 to be borrowed, would have been adequate to the
 object. But this conclusion turned out to be erro- Two other
 neous, and two other acts were passed, the one in acts for the
 1795, the other in 1798, by which the trustees were same road.
 empowered to raise an additional sum of 30,000*l.*
 on the credit of the tolls, and the expense of the
 road when completed amounted to 29,400*l.*

Several meetings were held under the act, and Meetings and
 proceedings.

April 4, 1814.
July 1, 1816.

ROAD TRUS-
TEES.—PER-
SONAL LIABI-
LITY.

Appellant's
constituents,
the trustees
chiefly inter-
ested in the
road, provide
money for the
execution.

Tolls assigned
to them in
security.

Contracts.

committees were appointed to contract for making bridges and parts of the road, and contracts were accordingly entered into, which were afterwards approved and ratified by general meetings. The first tangible fund for carrying these operations into effect was the money subscribed, there being no tolls on which money could be borrowed, until the road should be completed. The Appellant's constituents, who were the trustees chiefly interested, then obtained a cash-credit from the Bank of Scotland for 2000*l.*, for which they granted a bond, binding themselves "not only as trustees, but also each of us for ourselves, bind and oblige us conjunctly and severally, our heirs, executors, and successors whomsoever, to content and pay, &c." Additional sums were borrowed by the Appellant's constituents from individuals, to whom they granted bonds, by which "they bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors whatsoever, to content and repay the same" to the lenders. From these funds the road contractors, and proprietors whose grounds were occupied or damaged, were paid, and the Appellant's constituents, on payment of the subscriptions and the advance of these sums, were, from time to time, declared creditors on the tolls by regular meetings of the trustees.

The committees appointed by the body of the trustees, upon entering into contracts with road-makers, masons, &c., bound themselves only as trustees, while the contractors bound themselves, their heirs, executors, successors, and representatives, as in the contract with one Creelman, who was made "to bind and oblige himself, his heirs, executors,

“ successors, and representatives whatsoever,” to complete the road, &c., while the committee “ bound and obliged themselves, and the whole other trustees upon the said road, to make payment, &c.”

April 4, 1814.
July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

When the road was completed, the Appellant's constituents, who had advanced, for the purposes of the trust, the money borrowed on their own personal credit, paid up the balances due to the contractors, land-owners, and others, who had claims against the trustees, taking from these persons assignments of their claims, and then conveyed the whole to the Appellant, who, in their behalf, raised an action in the Court of Session against all the other trustees whose names appeared in the minutes of the proceedings as having attended any of the meetings, concluding to have it found that the other trustees were bound to relieve the Appellant's constituents of a proportion of the whole expense of the road; and should be decerned to make payment of 1000*l.* each, or such sum as should be found to be the proportion, &c. The object of the action was to have all the trustees, who had attended any of the meetings, found personally liable with their whole fortunes for a proportion of the whole expense, or at least for a proportion of the expense of the contracts, &c., authorized, approved, or in any way sanctioned, at such meeting or meetings as each had attended, and so liable, *per capita*, or each for an equal part, without distinction as to their acts, or the interest they had in the concern.

1798. Action, on the part of the trustees who had advanced the money, against the other trustees who had attended meetings, for their proportion of the expense.

Object of the action.

The cause came before Lord Craig (Ordinary) on Feb. 14, 1798, who ordered memorials, and reported the cause to the Court. The Court, on

April 4, 1814.
July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Interlocutor of the Court, Nov. 1799, appointing the Pursuers to state, in a condescendence, their grounds of claim.

Dec. 12, 1799. Interlocutory, that presence at meetings made the trustees personally liable.

Nov. 15, 1799, appointed counsel to be heard in their presence; and, before hearing, appointed the pursuers to give in a special condescendence of the grounds on which they meant to support their claims against the different Defenders, together with copies of the obligatory clauses in the contracts, and the bonds for the money borrowed. The Court, on Dec. 12, 1799, pronounced the following interlocutor: "The Lords having heard the counsel for the parties, resumed consideration of the cause, and advised the same, they find it proved by the minutes referred to, that the trustees assembled at meetings held under the act of parliament for making the road in question, appointed committees of their number, with power to enter into contracts and agreements relative thereto, in consequence of which, and of the contracts and agreements thus entered into, a great expense was incurred, which made it necessary to borrow considerable sums of money upon the credit of the tolls, and upon the private credit of the Pursuers' funds; that the Pursuers are entitled to a proportional relief from the other trustees, called as Defenders in this action, who were members of these meetings, and as such either gave their concurrence in appointing committees with power to contract as aforesaid, or afterwards homologated and approved of those contracts and agreements entered into for carrying the said resolutions of the said general meetings into execution, and remit to the Lord Ordinary to proceed accordingly."

May 14, 1800. The cause having come back to the Lord Ordinary.

nary, his Lordship ordained each of the Defenders to state, in a special condescendence, the particular circumstances by which he alleged he did not fall under the findings of the interlocutor of the Court. Before any further proceedings below, the cause was appealed, and on June 26, 1802, the House of Lords made the following order:—"It is ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the cause be remitted back to the Court of Session to review the interlocutors complained of, of Dec. 12, 1799, and Feb. 18, 1800, generally, and to find from which of the Defenders, and in respect of what particular sums as to each of them, the Pursuers, and which of them, are entitled to proportional relief, and by reason of what acts each such Defender became personally liable, and in what sums the Defenders are respectively liable to contribute to such relief; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of May 14, 1800, be, and the same is hereby, reversed."

April 4, 1814.
July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Lord Ordinary's interlocutor.

June 26, 1802.
Order of the House of Lords.
Remit.

The state of the case, under these judgments, appears to have been this; that the Court of Session at first thought that the circumstance of presence at a meeting was *prima facie* evidence of personal liability, and that the *onus* lay on each particular Defender to show, if he could, facts and circumstances exempting him; but that the House of Lords, on the contrary, thought that mere presence was not *prima facie* evidence of personal liability, and that the *onus* lay on the Pursuers to show other facts and circumstances by which each of the Defenders incurred that liability.

State of the question on these judgments.

April 4, 1814.
July 1, 1816.

ROAD TRUS-
TEES.—PER-
SONAL LIABI-
LITY.

Distinction in
the cases of
Livingstone
and Hamilton.

Lord Polkem-
met's case,
and cases of
other Respon-
dents—mere
presence at
meetings.

The Lord Ordinary, to whom it was remitted to apply the judgment of the House of Lords, accordingly ordered special condescendences to be given in, by the Pursuers, against each Defender. By consent of the parties eight of the cases were selected, the decision of which, it was hoped, would govern the rest, and in these cases the condescendences were given in. Sir Alexander Livingstone, and Mr. Hamilton of Westport, had not only attended meetings, but had been members of committees, and signed some contracts for making parts of the road and building bridges, and also references with landowners, to settle the compensation for ground taken for the purposes of the road; in which they bound themselves, their heirs and successors, to pay the sums that should be awarded.

Lord Polkemmet's name was inserted in the minutes as having attended two meetings, which authorized some works, approved of others, and agreed to references. His property lay chiefly in the line of a rival road; and, though on public grounds he did not oppose the objects of this trust, he took no active part in promoting them. He attended one meeting for the purpose of supporting a proposition that the road should be carried along the north side of a certain bog, instead of the south side, he having understood that the former line would be more beneficial to the public; but the south line was ultimately preferred. His design, in attending the other meeting, was to represent against what he conceived to be an improper practice adopted by the trustees, of demanding toll from those who merely crossed their new road. Sir Wil-

liam Cunningham, Mr. Hamilton Colt, Mr. Buchan of Ardinconnel, and the father of Mr. Nisbet of Cairnhill (Mr. Nisbet, being, it was contended, liable as representing his father), had merely attended a meeting or meetings where committees were appointed to contract, and contracts approved. Mr. Russel, of Andrew's Yards, had gone to the door of the room where a meeting was holding, to speak to one of the trustees on a matter of private business; and being seen at the door, a trustee proposed that his name should be put down as having attended, upon which, without entering the room, he stated that he did not mean to attend, and had never attended any of the meetings. His name, however, was inserted in the minutes, and this was the only ground of personal liability as to him.

After answers, &c. the Lord Ordinary reported the cause to the Court; and the Court, on Nov. 13, 1807, pronounced an interlocutor, "*finding* that no acts " had been condescended upon sufficient to render " the Defenders liable." On advising petitions against this interlocutor, with answers, the Court altered their previous interlocutor so far as to "*find* " that Sir Alexander Livingstone, and Mr. Hamilton " of Westport, were personally liable, in relief to the " Pursuers, for such contracts or deeds as they severally signed, but to no further extent." From these interlocutors the Appellant, Higgins, brought his appeal against Sir Alexander Livingstone, and Hamilton of Westport, in so far as they had not been found liable to the extent of the demand made by the Appellant, and against the rest generally.

For the Appellant, Higgins, it was contended that

April 4, 1814.
July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Russel's case.

Interlocutor,
Nov. 13, 1807.

Interlocutor,
March 8, 1808.
Those who signed contracts are so far personally liable; *secus* as to those who merely attended meetings.

April 4, 1814. the trustees must have known that the only tangible
 July 1, 1816.

ROAD TRUS-
 TEES.—PER-
 SONAL LIAB-
 ILITY.

fund was the 3000*l*. subscribed, and that no money could be borrowed on the credit of the tolls until the road should be completed, and the expense incurred, and that no contractor would undertake any of the operations on that security; that, under these circumstances, it was optional to every person to accept the trust or not; that such as accepted might have kept clear of individual responsibility by paying the contractors and land-owners with money borrowed on the credit of the tolls according to the act, or, if this could not be done, by giving up the trust; that the trustees did, in fact, occupy the ground, lay open inclosures, and enter into contracts, knowing that no money could then be borrowed on the credit of the tolls, and without any stipulation that the land-owners and contractors should accept the security of the future tolls for their payment; and that, therefore, the trustees themselves became personally liable, and each of them liable for an equal proportion of the whole expense, or at least of that which he authorized by attendance at meetings where the undertakings were ordered, in consequence of which the expense was incurred; that many of the operations had been sanctioned by the trustees before any money was borrowed on the individual credit of the Appellant's constituents; and, that on the same principle on which Livingstone, and Hamilton of Westport, who had, as members of committees, signed obligations, were personally liable, the great body of trustees who appointed the committees, and sanctioned their proceedings, ought also to be personally liable, because the Mandatory, acting within the

limits of his instructions, and having his acts sanctioned by the Mandant, cannot be individually liable without the right of recourse against the Mandant.

April 4, 1814.
July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

The following reasons, taken from the case of Buchanan of Ardinconnel, are a summary of the arguments for the Respondents.

1st, The Respondent did not bind himself in any written instrument to pay a share of the expense of making the road in question; and neither in virtue of the act which they obtained, nor of any general principle, were the Appellant's constituents, or others, entitled to impose any personal liability upon the Respondent.

2d, When the Appellant's constituents originally expended their money in making the road in question, they did not act under the belief that the Respondent was bound by law or contract to relieve them out of his private property.

3d, The only pretext in virtue of which the Appellant's constituents claimed to be relieved by the Respondent is merely this, that he attended three road-meetings. But that circumstance certainly cannot prove that he attended in any other character than as a trustee, or bound himself personally, and his heirs and executors, to do any thing not sanctioned by the act of parliament under which the meeting was held. The deeds of the majority might bind him as a trustee, but not as an individual, and there is no evidence that he bound himself in this last character.

4th, The meetings, attended by the Respondent, acted merely in an official capacity, as trustees under a turnpike act. Abundance of funds for the execu-

April 4, 1814. tion of the project, authorized by the turnpike act in
 July 1, 1816. question, were put into the hands of this and other

ROAD TRUS-
 TEES.—PER-
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 LITY.

meetings by the Appellant's constituents, who were interested in forwarding the work ; and the meetings, or general body of trustees, acted properly, when they lent the sanction of the authority delegated to them by the legislature, for the purpose of carrying into effect an useful public work. By giving their sanction to the lawful operations of the Appellant's constituents, the general body of trustees could incur no personal responsibility. The meetings sanctioned contracts and other transactions merely in the character of trustees. The Appellant's constituents were the only parties who bound their heirs and executors in any transaction.

5th, The demand is most unreasonable, that the Respondent shall repay to the Appellant's constituents a share of the expense of passing the turnpike acts, and which just amounts to a demand that, after they voluntarily subscribed sums for a public purpose upon the security of tolls, the money shall be repaid by their neighbours instead of themselves.

6th, Were this action of the Appellant's to be attended with success, it would prove nearly impossible to find trustees to execute any turnpike act, and nearly the whole of the landed proprietors in Scotland, or their descendants, would find themselves involved in the most perplexing and intricate lawsuits about questions similar to the present.

It was questioned at the bar, though the point was not much insisted on, as both parties had admitted the evidence below, whether the mere circumstance of a trustee's name appearing on the minute book, in the list of those stated to be present, was,

of itself, legal evidence of his having been actually present, as the name might have been inserted by mistake. As to Livingstone, and Hamilton of Westport, who had lodged a cross appeal, it was contended for them that they ought to have been exempted on the same principle, on which the other Defendants had been found not to be individually liable; for a member of a committee, acting as such, bound not himself but his constituents, who authorized him to act; and, if the great body of the trustees were not individually liable, it followed of necessity that those ought to be exempt who acted under their appointment and by their authority.

April 4, 1814.
July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

The case of *Horsley v. Bell*, (n.) 1 Bro. Ch. Ca. 101. was cited at the bar for the Appellant, in which the commissioners under an act of parliament for carrying on a navigation, as it was called, at Thirsk, in Yorkshire, were held personally liable for orders which they had not signed. But it was answered that, in that case, there was an unqualified personal order, that it was a case of personal profit to the commissioners, and that all the commissioners had signed some orders probably recognising the rest.

Sir S. Romilly and *Mr. Abercrombie* for the Appellant; *Mr. Adam* and *Mr. Leach* for the Respondents.

Lord Eldon, C. (after stating the previous proceedings). When the cause came first before this House, it was attended by two noble lords (*Roslyn* and *Alvanley*) since dead, who felt this to be a matter of infinite importance, and found it very dif-

July 1, 1816.
Judgment.

July 1, 1816.

ROAD TRUS-
TEES.—PER-
SONAL LIABI-
LITY.

ficult to say that a trustee, by the mere act of going into the room at the time when a meeting was held there, should be personally liable for all that was done at that meeting; and even that, if the meeting homologated or sanctioned the proceedings of previous meetings, and matters arising out of them, he, because he happened to be present at that meeting, should be personally liable for the whole. I might mention one or two instances, connected with these proceedings, to enable your Lordships the better to sift that principle, and judge of the extent of its operation. Suppose a man, nominated a trustee in the act of parliament, had gone, as Russel did, into the room, or to the door of the room, to ask for a friend, and had been seen, and his name put down, as the clerk puts down the name of a peer attending whether he votes or not, he would be personally liable for all the proceedings though he took no part in them. And so in the case of a magistrate of a burgh, nominated a trustee during his office, if he had gone into the room at the time of holding a meeting, only one day before the end of his year of office, though he went for no other purpose than to inquire about the health of a friend, he would be in like manner personally liable.

Horsley v.
Bell (n), cited
in Cullen v.

No case decided in this country applicable to the present has been found, except that of *Horsley v. Bell*,* C. C. Feb. 9, 1778, of which I have been

* The case, as stated in 1 Bro. Ch. Ca. (n.), 101, was this. Bill filed by Plaintiff, the undertaker of a navigation at Thirsk, in Yorkshire, against the commissioners (named in the act of parliament for carrying it on) who had signed the several orders. Three questions were agitated at the bar: 1st, Whether the De-

furnished with an accurate note by my friend (Mr. July 1, 1816. Cowper) who sits near me. On the authority of one noble Lord, that case was not very satisfactorily decided. But if it is to be understood in this limited sense, that the commissioners in that case were personally liable, not only as to orders which they signed, but also as to those orders which, though they did not sign them, they recognised by other orders which they did actually sign; *that* is different from attaching personal liability to the mere circumstance of presence at meeting, or going into the room.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Duke of Queensberry.
1 Bro. Ch. Ca. 101.

As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that when persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund applica-

When parliamentary trustees who must know whether there are funds, contract with those who do

endants were personally liable, they contending that they were exercising a public trust, and that the credit was given to the undertaking itself, and not personally to them, and that the remedy was therefore *in rem*; 2d, Whether all who had been present at any of the meetings, and had signed some, but not all the orders, were liable as to all the orders, or only as to those which they had respectively signed: 3d, Whether the Plaintiff was right in filing his bill in this Court, or his remedy was merely at common law. Ashurt and Gould, justices, and the Lord Chancellor, giving their reasons *seriatim* (for which see Brown), held the affirmative of all these propositions. Decree affirmed in D. P., March 23, 1787.

July 1, 1816.

ROAD TRUS-
TEES.—PER-
SONAL LIABI-
LITY.

not know,
they must pro-
vide funds to
pay the con-
tractor.

ble to the object, and are then personally bound to provide funds to pay the contractors.

When this case was here before, the House must have been of opinion that the mere circumstance of presence at a meeting of trustees did not subject those so attending as individuals to contribution, or payment of the tradesmen ; for the fact of presence was then before the House, by means of the minutes and names put down, as fully as it could, in this case, be brought under your Lordships' view : and the House could never have thought proper to remit the cause, if the Lords had been of opinion that mere presence at meetings did subject the trustees to personal liability. And then, when one considers the difference between giving orders for the execution of any particular work, and the fact of a person merely coming into the room while a meeting on the subject of the trust is there held, it would be going a great way to say that a person, so coming in, should be personally liable for every thing done at the meeting. A person may come in for the purpose of stating his opinion upon a particular point, as Lord Polkemmet did with respect to the question whether the line of road should be carried along the north side, or along the south side, of a certain swamp or bog ; and having given his opinion on that point, he leaves the room : and then, when he is no longer present, for the minutes do not distinguish between those who continued present and those who went away, certain contracts are made at that meeting ; and if, merely because the meeting gave its authority to these contracts, he is to be held personally responsible, it is

one of the hardest doctrines that can belong to the execution of a public trust of this kind.

Then this House made the following order: "It is ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the cause be remitted back to the Court of Session to review the interlocutors complained of, of Dec. 12, 1799, and Feb. 18, 1800, generally, and to find from which of the Defenders, and in respect of what particular sums as to each of them, the Pursuers, and which of them, are entitled to proportional relief, and by reason of what acts each such Defender became personally liable, and in what sums the Defenders are respectively personally liable to contribute to such relief." When the House made this order it was perfectly cognizant of the minutes, and if the House had meant to hold that, because A. B. and C. were at such meetings, and at such periods, that was sufficient to fix them personally, the House should have said so at the time, and not have sent the cause back again to the Court of Session, as the minutes were then before the House.

I would here observe that even at these Scotch meetings, where they have larger powers than are given in this country, though, if the trustees confine themselves to the act of parliament, and the application of the funds provided under the act, they are entitled by a majority to bind the rest; yet, if they enter upon the consideration of what does not strictly belong to the execution of their duty as trustees, the majority cannot bind the others; and then, if the majority contract, before they can bind the minority they must show certain acts of homologation or approba-

ROAD TRUSTEES.—PERSONAL LIABILITY.

June 26, 1802.
Remit.

July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

tion, by which each is—not made liable in the execution of the trust—but personally pledged.

Now the manner in which the remit has been applied is this. The Lord Ordinary, to whom the cause was remitted by the Court of Session, to give effect to the judgment of the House of Lords, appointed the Appellant to state in separate condescendences the facts, in virtue of which each of the Respondents was alleged to be liable, and the extent of the liability. Condescendences were accordingly given in, and the acts, in virtue of which the personal liability was incurred by each, and the extent of that liability were stated; and, as to this second point, the Appellant's constituents persisted in maintaining that each trustee who approved of any part of the road, was liable for a proportion of the expense of the whole road. This was wonderfully large. But they say this, You knew that, though the road was allotted into parts or districts for the facility of contracting, the whole road under the trust was truly and in fact only one road; and therefore, when you authorized the expense of a part, you authorized the expense for the whole. It would be difficult however to bind any person by such reasoning as this. And then they contended that each of the Respondents was liable for a proportion of the expense of every undertaking, of which, as a member of a meeting or otherwise, he had authorized the performance.

Acts in consequence of which the Respondents were alleged to be personally liable.

Sir Alexander Livingstone was at a variety of meetings, was a member of committees, and signed contracts. Lord Polkemet was present at two meetings, which, among other acts, authorized a com-

mittee to contract for one division of road, approved July 1, 1816. of a contract for another, and entered into references, by which a great expense was incurred, and, the number present being given, his share was assigned. There is a very able paper on the part of Lord Polkemet, and it represents his ignorance of the expenditure; that in attending the meetings he had two particular objects in view, and left them when these were disposed of; that the meetings were distant a year and a half from each other; that he took no part in the business beyond the particulars mentioned; and that the demand was a surprise upon him. Sir William Cunningham was present at two meetings: Mr. Buchanan was present at three meetings; and as to him they relied upon an answer written by him to a letter from their agent, which he however sufficiently explains.

ROAD TRUSTS.—PERSONAL LIABILITY.

Now, without troubling your Lordships with a further statement of particulars, the result is that, with the exception of the cases of Hamilton of Westport, and Sir Alexander Livingstone, the circumstance from which the liability is contended for is, that the parties were present at certain meetings; and the case of Nisbet is remarkable as he was said to be liable as representing his ancestor, because that ancestor was present at a meeting.

Then the question here, as I take it, is this; whether, when you consider your own remit, it is possible to say that this last judgment of the Court of Session has miscarried. It is one thing to say that I shall content myself with a condescendence, alleging the mere fact of presence, and another thing to say that, at such meetings, A. B. and C.

July 1, 1816. took such parts, with a view not to subject them on account of mere presence, which appears to have been negatived by the remit, but in consequence of some acts done by them. And though presence is not *prima facie* sufficient, if it had been shown that a trustee was there, and had done so and so, as in the case of Sir Alexander Livingstone, that would have met the idea of your Lordships. But I cannot think that the meaning of the House was, that the circumstance of mere presence at a meeting or meetings should make a trustee personally liable.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Nov. 13, 1807. After further considering the case, the first judgment was this. “ On report of Lord Craig, having
Interlocutor appealed from. “ advised the memorial for the Pursuer, with the
“ counter memorial for John Hamilton Colt, Esq.
“ and whole cause, together with the remit from the
“ House of Lords, the Lords find that no acts have
“ been condescended upon sufficient to render John
“ Hamilton Colt liable in payment of the sums
“ demanded, or in relief to the Pursuers ; therefore
“ recall their interlocutors of Dec. 12, 1799, and Feb.
“ 18, 1800, appealed from ; sustain the defences
“ pleaded for the said John Hamilton Colt; assoilzie
“ him from the conclusion of the action, and decern,
“ and find no expenses due; appoint the con-
“ descendences, answers, replies, and duplies given
“ in before the Lord Ordinary to be withdrawn from
“ process, and make no part of the proceedings.”
A similar interlocutor was pronounced in the case of each and every of the Defenders. A petition was presented by the Appellant, complaining of the interlocutor as applicable to the case of Sir Thomas Livingstone, one of the Defenders, in which the

merits of the cause were fully argued ; and short July 1, 1816. petitions were presented against the other Defendants, referring to the argument contained in that against Sir Thomas Livingstone.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Upon advising these petitions, with answers, the following interlocutor was pronounced of this date : March 8, 1808.
Interlocutor
appealed from.

“ The Lords having resumed consideration of this
 “ petition, and advised the same, with the answers
 “ thereto for Sir Thomas Livingstone, and the common agent in the ranking of Sir Alexander Livingstone, his father’s creditors ; and having also resumed consideration of the several petitions for the
 “ Pursuer against Sir William Augustus Cunyngham, the Honourable William Baillie of Polkemmet, John Hamilton Colt, William Hamilton, Andrew Buchanan, George More Nisbet, Defendants, alter
 “ their interlocutors reclaimed against, in so far as
 “ to find that the deceased Sir Alexander Livingstone was personally liable, and that the said William Hamilton is also personally liable in payment of
 “ the sums demanded, and in relief to the Pursuer for the expense of such contracts or deeds as they
 “ severally signed, but to no further extent ; and to
 “ that extent they find the Pursuer entitled to have
 “ decreet *cognitionis causa* against Sir Thomas Livingstone, and remit to the Lord Ordinary to
 “ proceed accordingly ; but *quoad ultra* adhere to
 “ said interlocutor, and refuse the prayer of the several petitions against these two Defendants ; and as
 “ to the whole of the other Defendants above named, the Lords adhere to their interlocutors reclaimed
 “ against, and refuse the prayer of the respective
 “ petitions, &c.”

July 1, 1816.

ROAD TRUS-
TEES.—PER-
SONAL LIABI-
LITY.

The mere fact
of presence at
meetings not
sufficient to
render the
trustees per-
sonally liable.

Now it appears to me that this judgment proceeded on this principle; that, if you state in your condescendence and prove no more than the mere coming into the room, or presence at a meeting, that is not sufficient to render a trustee personally liable: but, on the other hand, if they made themselves parties to the contracts, so as to pledge themselves personally to the other parties with whom they contracted, or so as to be considered as between themselves and those with whom they so contracted, as undertaking that there was a fund sufficient to answer the purpose, that then they were individually liable: and that accounts for the distinction made between the cases of Sir Alexander Livingstone and Hamilton of Westport, and the others: and then the personal liability of these two must proceed, not on the circumstance of presence at the meetings, but on the acts and deeds done by them, the contracts which they executed, and the evidence that they concurred. As to the others, nothing was alleged but the mere fact of their going into the room while the meetings were held, and by the former judgment of this House that was considered as not sufficient to bind the parties personally. And to be sure, nothing could be harder than that Russel, who went into the room, or to the door of the room, while a meeting was holding, merely to ask for a friend, should be personally liable for any contract there entered into; or harder than that if a person in office went, once during the year of his office, into a room where a meeting was holding, he should, on the mere evidence of these minutes that he was present, be considered as therefore personally liable.

This does not break in at all on the principle that they might be liable personally if they homologated what had been done. But the condescendences and case carry it no further than mere presence at meetings.

July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

I propose, therefore, that the interlocutors complained of be affirmed generally as they stand.

Judgment of the Court below *affirmed*.

Agent for Appellant, CAMPBELL.

Agents for Respondents, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MAULE—*Appellant*.

MAULE—*Respondent*.

SUBMISSION and decret arbitral in 1782 between A. and B; the latter taking burden upon him for his son C., a minor, whose interest was concerned. B. dies in 1789, and C. comes of age in 1794, and does various acts under the decret arbitral, believing it to be a *bond fide* submission and award. In 1809, C. discovers the uncorrected scroll of the submission, and letters of one of the arbiters, from which it appears that the arbiters had not been left to the free exercise of their own judgment on the matters referred to them, but had been bound down by a previous agreement or compromise between the parties; so that the transaction was in reality an agreement to be carried into execution under the colour of an award. Held by the House of Lords, reversing the judgment of the Court of Session,

April 9,
May 10, 1816.

DECRET ARBITRAL (AWARD) NOT VALID AS SUCH, IF USED AS A CLOAK FOR A TRANSACTION OF A DIFFERENT NATURE.

April 9,
May 10, 1816.

that, under these circumstances, and upon this evidence, the transaction was not a valid decret arbitral, nor binding as such upon C.

DECRET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

Leases of the
houses and
parks of Pan-
mure and
Brechin.

THE estates of Panmure having been forfeited to the Crown in 1715, by the attainder of James, then Earl of Panmure, and brought to sale, were purchased by the York Building Company; and that Company, on April 23, 1724, executed a lease for ninety-nine years, of the house and parks of Panmure, to the Countess of Panmure, widow of Earl James, and her assignees whatsoever, at 100*l.* yearly rent; and a lease, of the same date, of the mansion-house and parks of Brechin to Mr. Harry Maule, brother and next heir of Earl James, and to his assignees whatsoever, for ninety-nine years from the time of his entry, which was declared to be at the determination of the said Countess of Panmure's life-rent of the subjects, for 50*l.* yearly rent.

Entail of the
estates of
Kellie and
Ballumbie,
1730.

In 1730, Sir Harry Maule, with the concurrence of his sons William and John, executed a strict entail of the estate of Kelly; and the son William, of the same date, executed an entail of the estate of Ballumbie, to which he was then entitled in possession, to the same series of heirs; and also granted an obligation to employ a sum of 9000*l.* sterling in the purchase of lands, to be settled according to the provisions of the entail, in consideration of a bond for 10,000*l.* which had been granted by the late Earl of Panmure to the Countess previous to his forfeiture, to which he, William, had acquired right. The Countess and Sir Harry, in

the same year, also executed entails of the leases of April 9, the mansion-houses ; and parks of Panmure and ^{May 10, 1816.} Brechin, to the same series of heirs. The desti- DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE. nation was, after Harry Maule's decease, to Wil- Entail of the
leases, 1730.
Substitution
in the entails. liam Maule, his eldest son and the heirs male of his body ; whom failing, to John Maule, his other son, and the heirs male of his body ; whom failing, to any other heirs male to be procreated of the body of Harry Maule ; whom failing, to Dr. Henry Maule, Lord Bishop of Cloyne, in Ireland, his next heir male, and the heirs male of his body ; whom failing, to James Maule, the Bishop's brother, and the heirs male of his body ; whom failing, to the nearest lawful heirs male of Harry Maule ; whom all failing, to his nearest lawful heirs and assignees whatsoever. The entails were never recorded.

The Countess of Panmure died in 1731, and <sup>Death of H.
Maule, 1734.</sup> Mr. Harry Maule in 1734 ; and William the eldest <sup>His son Wil-
liam possesses
without ac-
knowledging
the leases.</sup> son, afterwards created an Irish Peer, with the title of Earl of Panmure, made up titles to the estate of Kellie upon Harry Maule's investitures, dated 1687, which did not extend the substitution to the Bishop of Cloyne. He continued to hold Balumbie on his title prior to the entails, and he possessed the mansion-houses and parks of Panmure and Brechin, without any acknowledgment of the entails of the leases, from 1734 to 1781, the period of his death, previous to which he purchased the property of the subjects of the leases.

In July, 1781, John Maule, the other son of <sup>Death of John
Maule, 1781.</sup> Harry, a Baron of the Exchequer, died without issue, having bequeathed to Lieutenant Thomas Maule, grandson of the Bishop of Cloyne, and

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DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSAC-
TION OF A
DIFFERENT
NATURE.

Entail of
1781.

Death of Wil-
liam Earl of
Panmure,
1781; and
competition
between the
claimants
under the en-
tails 1730, and
the claimants
under the en-
tail 1781.

Interlocutor,
1782, sustain-
ing the claim
to the leases
under the en-
tails of 1730.

Appeal.

Arbitration.

father of the Appellant, a bundle of papers, includ-
ing the entails of 1730, and the obligation for
9000*l*.

The Earl of Panmure having purchased the whole
of the family estates in Forfarshire, including the
subjects of the leases, in 1781 executed an entail of
the whole to his nephew, the Earl of Dalhousie, in
life-rent; and to his second son, and his younger
sons, *seriatim*, in fee. The Earl died without issue
in less than three months after executing this entail;
and then a competition for the estates arose between
the Earl of Dalhousie for himself, and as admistra-
tor in law for his second son the Respondent;
and Thomas Maule, the Appellant's father, descend-
ant and heir male of the Bishop of Cloyne, claim-
ing under the entails of 1730. The result was that
the Court of Session, by interlocutor of March 1,
1782, found that the entails, 1730, of Kelly and
Ballumbie, had been cut off by the positive and ne-
gative prescription, and that the obligation relative
to the 9000*l*. was cut off by the negative prescrip-
tion; and that the Earl had full power over these
subjects. But with respect to the leases of the man-
sion-houses, &c. of Panmure and Brechin, the sub-
jects now in question, the Court found that Tho-
mas Maule had a right to take them up.

The Earl of Dalhousie entered an appeal to the
House of Lords against this judgment in so far as
respected the leases. The parties then referred the
whole matters in difference to the arbitration of Mr.
Wight, the leading counsel for Thomas Maule, and
named by him as arbiter, and Sir Ilay Campbell,
leading counsel for the Earl of Dalhousie, and

named arbiter by him, and in case of variance between these arbiters, to the decision of M'Queen, of Braxfield, one of the Judges of the Court of Session, whose opinion had been given in favour of Thomas Maule with respect to the leases; the Earl of Dalhousie taking burden upon him for the Respondent, and T. Maule for the Appellant. The submission was dated March 30, 1782, and the arbiters made their award on the 2d of April following, thereby finding that the leases were at an end in consequence of the purchase of the property by the Earl of Panmure, and that the entails of them were at any rate cut off by prescription, and were not subsisting deeds; and therefore they reduced the same, and reversed the interlocutor of the Court so far as respected the leases, and affirmed it as to all other points. But in consideration of depriving Thomas Maule, and the heirs under the entails of 1730, of the leases adjudged in their favour by the Court of Session, the arbiters ordained the Earl of Dalhousie, his son, and their heirs, to advance 3500*l.*, 500*l.* of which was to be paid to Thomas Maule immediately, and the remaining 3000*l.* to be laid out on security, in the name of trustees, to the use of Thomas Maule and the other heirs under the entails of 1730 (except as under-mentioned), who were to be entitled to the interest of the principal remaining unpaid, during the subsistence of the trust; 500*l.* of the principal to be paid in 1789, 2000*l.* in 1823, the time of the expiration of the Panmure lease, and the remaining 500*l.* in 1831, the time of the expiration of the Brechin lease. There was this difference between the destination of the

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DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
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NATURE.

Award or decret
arbitral.

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May 10, 1816.

DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
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NATURE.

leases and that of the money; that in the case of the leases the ultimate destination was to the heirs and assignees whomsoever of Harry Maule; and with respect to the money, the ultimate destination was to the heirs and assignees whomsoever of Lieutenant Thomas Maule.

The appeal was then withdrawn; the money was advanced in terms of the award, and the 500*l.* paid to Lieutenant Maule. Mr. Wight and Sir Ilay Campbell were appointed trustees, and Lieutenant Maule received the interest of the 3000*l.* till his death in 1789. In 1791 the Appellant, then a minor, was served heir male, and of provision under the decret arbitral; and concurred with the Respondent, after the death of Mr. Wight, in the discharge of Sir Ilay Campbell, and the appointment of Mr. Campbell, now Lord Succoth, and Mr. Corbet, advocates, as trustees; and the deed was written by the Appellant himself, who, since his father's death, received the interest and discharged it, and did other acts which were afterwards founded upon as acts of homologation.

The Appellant came of age in 1794, and soon after went into the army, and was ordered with his regiment to Ireland, where he resided till 1809, when he came to Scotland. He then heard of the death of a Mr. Maule, factor to the Earl of Moray, who had promised him a legacy; and, on examining certain papers, part of which had belonged to the deceased, and part to a Mr. James Maule, clerk to Mr. Leslie, writer to the Signet, who had been agent for Lords Panmure and Dalhousie, he found a paper entitled, "Opinion of Mr. David Rae,

1809. Discovery of evidence.

“ and Mr. Ilay Campbell upon the title deeds of April 9,
 “ Kellie and Ballumbie, August, 1781 ;” and another May 10, 1816.
 entitled “ Submission, between George Earl of Dal- DECREET AR-
 BITRAL
 (AWARD),
 NOT VALID AS
 SUCH, IF
 USED AS A
 CLOAK FOR A
 TRANSA-
 CTION OF A
 DIFFERENT
 NATURE.
 “ housie, and Thomas Maule, Esq. 1782.” The
 Appellant then caused a search to be made among
 his father’s papers, and found two letters of the
 dates March 24 and 29, 1782, from Mr. Wight to
 the Appellant’s father. From the papers thus dis- Scroll of the
 submission.
 Letters of Mr.
 Wight.
 covered, it appeared that Sir Ilay Campbell and Mr.
 Rae, afterwards Lord Eskgrove, had been of opinion
 that the leases were not extinguished by the purchase
 of the property, and that it was very questionable
 whether the entails of them were extinguished by Opinion of
 counsel.
 Agreement.
 prescription ; and that an agreement or compromise
 had been entered into by the parties, or their coun-
 sel, previous to the submission and award, in which
 the utmost amount of the sum to be given for the
 leases and the other points to be decided, and
 which afterwards were decided by the award, had
 been arranged and settled. The letters of Mr.
 Wight referred to the treaty, and mentioned his
 exertions to bring the other party to higher terms ;
 and in the scroll of the submission, prepared by
 Mr. Leslie, it was stated that, to avoid further pro-
 ceedings at law, a treaty had been entered into be-
 tween the counsel for the parties, and a verbal agree-
 ment concluded to the following effect ; and then
 the terms of the agreement were set forth as they
 afterwards appeared in the decret arbitral. This
 narrative was, on revision, struck out.

Upon discovering these papers the Appellant ap-
 plied to the Respondent to consent to depart from
 the transaction, and to a re-hearing of their claims

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May 10, 1816.

DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR
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NATURE.

Action to set
aside the
award, 1809.

on the footing on which they had been placed by the judgment of the Court of Session in 1782; but this being refused, the Appellant raised an action of reduction and declarator to set aside the decreet arbitral and service thereon, on the grounds that the arbiters had not been permitted to exercise their own judgment on the matters pretended to be referred to them, but had been bound down by a previous agreement, bargain, or transaction, and that the parties to the transaction had no power to bind the Appellant as heir of entail.

Several important questions were agitated in the course of the pleadings; but the only point decided by the Court was, that this was a valid decreet arbitral, and was homologated as such by the Appellant. The Judges were equally divided till Lord Pitmilley was called in; and he being of opinion that the decreet arbitral was valid and binding, the Court (2d division) by interlocutor of March 9, 1813, repelled the reasons of reduction, &c. From this interlocutor the Appellant appealed.

Interlocutor,
Mar. 9, 1813.
Appeal.

The appeal was heard in the House of Lords in April, 1816.

Judgment.

April 9, 1816.

Lord Eldon (C.) This is an appeal from an interlocutor of the Court of Session of March 9, 1813, in which William Maule, of Killumney in Ireland, great grandson of Dr. Henry Maule, Lord Bishop of Cloyne, and the Honourable William Ramsay Maule, of Panmure, are the parties; and the object of the Appellant, William Maule of Killumney, was to reduce or set aside a certain decreet arbitral or pretended decreet arbitral, and the opi-

nion of the Lords of Session appeared in the interlocutor appealed from, which was this: "The
 " Lords having resumed consideration of this pro-
 " cess, and advised the mutual informations and
 " additional informations for the parties, writs pro-
 " duced, and former proceedings, repel the reasons
 " of reduction, sustain the defences, assoilzie and
 " decern, &c." I here take a short notice of the
 fact that the Court was equally divided till Lord
 Pitmilley was called in, and that some of the Lords
 who were in favour of the interlocutor stated that
 this was a case of very great difficulty.

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DECREET AR-
 BITRAL
 (AWARD),
 NOT VALID AS
 SUCH, IF
 USED AS A
 CLOAK FOR A
 TRANSA-
 CTION OF A
 DIFFERENT
 NATURE.

It is unnecessary to state the previous proceedings at length, but the result was the interlocutor of 1782. No judgment, it was stated, had ever before been given in favour of an entail of leases. The property in dispute was represented as being very valuable. The fact was admitted that Mr. Wight and Mr. Campbell, afterwards Sir Ilay Campbell, were present at the time when the judgment was pronounced; the one as counsel on the one part, the other as counsel on the other part. What was called the submission was executed on March 30, 1782, and afterwards the award, or what was so termed, was made on April 2, 1782, two days after the execution of the submission, and was as follows.

After the usual preamble it proceeds: "1st, We
 " find that the said leases of the house and parks of
 " Panmure, and castle and inclosures of Brechin,
 " obtained by the Countess of Panmure and Mr.
 " Harry Maule from the York Building Company,
 " in 1724, are now at an end, in consequence of the
 " late Earl of Panmure having purchased the pro-

Decreet arbitral or award.

April 9, 1816. “perty”—(that is a finding of the arbiters contrary to the law of the interlocutor of March 1, 1782);—

DECREET AR-
BITRAL
(AWARD),
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SUCH, IF
USED AS A
CLOAK FOR A
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“and that the tailzies of them executed in 1730,
“and founded on by the said Thomas Maule, Esq.
“are at any rate cut off and extinguished by pre-
“scription as well as upon other grounds of law,
“and are not now subsisting deeds; and therefore
“we reduce the same, and assoilzie the said George
“Earl of Dalhousie, as life-renter, and the said
“William Ramsay Maule, his second son, as fiar of
“the estate of Panmure, and the other heirs of
“entail of the said estate, from all claim or demand
“upon those leases, or upon the tailzies thereof,
“at the instance of the said Thomas Maule, Esq.,
“or his son, or any other person claiming under
“these deeds of 1730; and we so far alter the in-
“terlocutor of the Court of Session recited in the
“submission pronounced on March 5 last; but we
“adhere to the said interlocutor in all other points,
“and declare the same to be final and unalter-
“able.”

Having thus decided the case in all particulars, and affirmed in substance that Thomas Maule had no claim to any thing, they proceed thus:—“And
“as we conceive it to be just and reasonable, that
“the said Thomas Maule, Esq. *though not entitled*
“to make any legal claim upon the foresaid deeds
“executed in 1730, should have the following *pro-*
“*vision in money* settled upon him and his heirs
“under-mentioned, in consideration of our having,
“by this decret arbitral, *deprived him and them*
“of the benefit of the leases, which the Court of
“Session had adjudged in their favour, we decern

“ and ordain the said George earl of Dalhousie, for April 9, 1816.
 “ himself, and as administrator in law for his said
 “ second son, and taking burden as aforesaid, and
 “ his heirs and successors in general, to make pay-
 “ ment to the said Thomas Maule and his heirs
 “ under-mentioned, of the sum of 3500*l.* sterling,
 “ in manner and at the terms following: viz. 500*l.*
 “ thereof to the said Thomas Maule himself, im-
 “ mediately after the decree is registered, and the
 “ remaining 3000*l.* at the term of Whitsunday next;
 “ but which 3000*l.* is then to be *laid out* upon good
 “ and sufficient security, to be taken in the name
 “ of two trustees, one to be named by each party,
 “ for the use”—observe—“of the said Thomas Maule,
 “ Esq. and the heirs male of his body; whom fail-
 “ ing, any other heirs male of the body of Dr.
 “ Harry Maule, Lord Bishop of Cloyne; whom
 “ failing, the heirs male of the body of Captain
 “ James Maule, brother to the Bishop; whom fail-
 “ ing, the heirs male whatsoever of the said Mr.
 “ Harry Maule; whom failing, the said Thomas
 “ Maule, Esq. his heirs and assignees whatsoever:
 “ which trust is to continue till the term of *Whit-*
 “ *sunday* 1831; but with the following conditions
 “ and limitations; in the first place, that the said
 “ Thomas Maule, and, failing him, the heirs of his
 “ body, and other heirs already mentioned, shall
 “ have full right to the yearly *interest* arising upon
 “ the said sum from Whitsunday next, and in time
 “ coming, during the trust, so far as the capital
 “ shall remain unapplied to their uses. 2dly, That
 “ 500*l.* of the said capital of 3000*l.* shall be uplifted
 “ and paid over to the said Thomas Maule, or, fail-

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 BITRAL
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 NOT VALID AS
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DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
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CTION OF A
DIFFERENT
NATURE.

ing him, the heirs male of his body, or other heirs already mentioned, at the term of Whitsunday 1789; that 2000*l.* more of the said capital shall be payable to him or them, at the term of Whitsunday 1823, and the remaining 500*l.* at the term of Whitsunday 1831, and then the trust shall be at an end: and if either of the trustees shall happen to die before the expiration of the trust, the party by whom, or by whose predecessor, he was named, shall have power to appoint another, and so on till the end of the trust; and the trustees shall have power to change the securities from time to time, when necessary. 3rdly, We further declare, that if either the said Thomas Maule, or his said son William Maule, or any other heir male of his body, or subsequent heir called by the said deeds in 1780, now reduced, shall hereafter *attempt* to make any claim upon the said deeds, or any of them, under pretence of their not being bound by this submission, or on any other ground whatever, it shall be competent for the said George Earl of Dalhousie, and his said second son, or the other heirs in the estate of Panmure, in their order, immediately to insist for repetition of the trust money, so far as the same is unuplifted at the time, or so far as the same has been uplifted by the person making such claim, or by any other whom he represents, and for damages against the said Thomas Maule and his heirs: and, in like manner, if the said George Earl of Dalhousie, or his said second son, or any of the other heirs succeeding in the estate of Panmure, shall attempt, in any shape, to

“counteract this our decret arbitral, they shall be
 “liable in damages to the other party; and the said
 “George Earl of Dalhousie’s heirs of every kind
 “shall be so liable, &c.”

April 9, 1816.

DECRET AR-
 BITRAL.
 (AWARD),
 NOT VALID AS

I should have mentioned that Lord Braxfield was made oversman in the submission, and it was admitted at the bar that it was chiefly by the weight of his opinion that the Court was led to pronounce the interlocutor of March 1, 1782; and I should also have mentioned that the award was to be made in eight days from the date of the submission.

SUCH, IF
 USED AS A
 CLOAK FOR A
 TRANSACTION OF A
 DIFFERENT
 NATURE.
 Lord Brax-
 field, overs-
 man.

Thus the gentlemen acting as arbiters affirmed the interlocutor so far as it was in favour of the Earl of Dalhousie and his son, and disaffirmed it in so far as it found that the entail of the leases was binding; thereby asserting that, in point of law, Thomas Maule had no right to the leases, and that they were at an end in consequence of Lord Panmure’s having purchased the property, and that the tailzies of the leases were at any rate cut off and extinguished by prescription; and then having, as it seems to me, decided that Mr. Thomas Maule was entitled to nothing, they go on to say that, though Thomas Maule was not entitled to make any legal claim, yet as they had deprived him of all that benefit in respect of the leases to which the Court had found him entitled, it was just and reasonable that he should have a sum of money, part of which was to be paid to Mr. Thomas Maule immediately, the rest to be secured for the use of the heirs substituted in the entail of the leases. This decret arbitral was made on April 2, 1782.

The Appellant’s case then proceeds to state the

April 9, 1816. reasons why the suit to set aside the award was not instituted till 1809. The Pursuer it seems then discovered certain papers which led him and his advisers to think that the award was not binding upon him ; and he thought proper to institute the present action of reduction and declarator, calling for production of the alleged submission and decret arbitral, with the retour of his service expedite thereon ; and concluding, that these writings should be reduced and set aside for the following reasons :—

DECREET ARBITRAL (AWARD), NOT VALID AS SUCH, IF USED AS A CLOAK FOR A TRANSACTION OF A DIFFERENT NATURE.

1809. Conclusions of the action.

“ 1st, That, although *ex facie* of the foresaid pretended submission it bears to be a reference of the depending processes, and various points of dispute between the parties therein named ; yet, in fact, it was not a submission, but only a bargain, covenant, or agrément, of a nature essentially different from what, in law, is held and understood to be a regular and proper submission or reference ; and the said pretended decret arbitral, following thereon, is false, feigned, and destitute of truth. It sets forth that the arbiters had considered the claims of the parties, and had God and a good conscience before their eyes, and were well and ripely advised therewith : whereas the truth is, that the said arbiters never heard parties on, nor considered their claims, nor had any power whatever so to do under the said pretended submission. They were fettered and bound down by a previous agreement, to pronounce the said pretended decret arbitral in the terms in which it is given forth, and were not at liberty to exercise, nor did they exercise, their own judgment and discretion upon the questions ap-

“parently submitted to them. 2d, The parties to ^{April 9, 1816.}
 “the said pretended submission, bargain, covenant,
 “or agreement, whereon the said pretended decret ^{DECREET AR-}
 “arbitral proceeded, had no power to bind the ^{BITRAL}
 “pursuer, as heir of tailzie, to give effect to the ^{(AWARD),}
 “same, or abide thereby ; and, therefore, the same, ^{NOT VALID AS}
 “with the service of the pursuer, as heir male and ^{SUCH, IF}
 “of provision, under the said pretended decret ^{USED AS A}
 “arbitral, and whole acts and deeds done by the ^{CLOAK FOR A}
 “pursuer, on the ground, and under the erroneous ^{TRANSACTION OF A}
 “conception of its being a fair decret arbitral, ^{DIFFERENT}
 “pronounced upon a solemn and legal submission ^{NATURE.}
 “by arbiters, at full liberty to exercise their own
 “judgment upon the points apparently submitted
 “to them, are null and void so far as regards the
 “pursuer, and not binding on him.” And it being
 so found and declared, “the said Honourable Wm.
 “Ramsay Maule, defender, ought and should be
 “decerned and ordained, by decret foresaid, to flit
 “and remove himself, his servants, cottars, de-
 “pendants, and all others, off and from the said
 “houses and parks of Brechin and Panmure, and
 “others foresaid ; and to leave the same void and
 “redd, to the effect the pursuer, for himself, his
 “servants, cottars, tenants, and others, may enter
 “thereto, and possess, bruik, and enjoy the same
 “at pleasure, during the currency of the said
 “leases ; and the said Honourable William Ramsay
 “Maule, ought further to be decerned and or-
 “dained, by decret foresaid, to hold compt and
 “reckoning with the pursuer for his intromissions,
 “with the rents and profits of the said houses and
 “parks of Brechin and Panmure, and others fore-

April 9, 1816. "said, since the death of the said Lieutenant
 "Maule, and pay over to the pursuer the amount
 "thereof, as the same shall be ascertained in the
 "course of the process to follow hereon, &c."

DECREET AR-
 BITRAL
 (AWARD),
 NOT VALID AS
 SUCH, IF
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 TION OF A
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 NATURE.

Your Lordships observe that this action insists that these writings are not to be considered in law as a submission and decret arbitral, and that relief ought to be given on that ground, as if the submission and decret had never been made. What relief ought, in the opinion of the Court of Session, to be given to the Pursuer, in case this should not be considered as a binding decret arbitral, we cannot collect, as the circumstance, that the majority of the Court were of opinion that the decret arbitral was valid and binding, made it unnecessary to give any opinion on that point.

In these papers questions have been elaborately and ably discussed, on which it is not necessary to give an opinion. The first point argued in the Appellant's appeal case is that the judgment of the Court of Session in 1782, sustaining Lieutenant Maule's claim to be served heir of tailzie to Lord Panmure, in the leases of Panmure and Brechin, was well founded. That however is not the ques-

The only ques-
 tion for deci-
 sion, whether
 this is a valid
 decret arbi-
 tral.

tion here at present; the only question now before us is, whether this is a valid decret arbitral. The other points may be material if the decret arbitral is not valid and binding, but the Court below has given no opinion upon them. The same observation applies to some other questions discussed under the second and third heads of argument stated in the Appellant's case. I intimated at the hearing that the Judges had given no opinion upon this as

a *transaction* in any other sense than in that of a *decreet arbitral*. As to the point of homologation, all the Judges, according to the notes which I have, speak of the homologation of the transaction only in its character of a *decreet arbitral*. They have decided that it is a valid *decreet arbitral*, and if it was unnecessary to consider the homologation in any other view; and, if they did not consider it in any other view, then there is no opinion of the Judges on the homologation of this transaction as different from a *decreet arbitral*.

APRIL 9, 1816.
 DECREET AR-
 BITRAL
 (AWARD),
 NOT VALID AS
 SUCH, IF
 USED AS A
 CLOAK FOR A
 TRANSACTION OF A
 DIFFERENT
 NATURE.
 Transaction.
 Homologa-
 tion.

The simple point then is, whether this is a real submission and award, or only an agreement of the parties, to which the form of a *decreet arbitral* was given, for the purpose of giving it greater validity. And when I come to discuss that point it will be most painful to me if, with the opinion that this is no more than an agreement under the form of a *decreet arbitral*, it should be supposed that I accede to any imputations that may have been thrown out against the gentlemen who acted as arbiters. For at an early period of my life I believe I have been at that bar with Mr. Wight, a man of high character; and as for Sir Ilay Campbell, he is well known, and of his character I need say nothing; and, under the circumstances of the case, I think it would be dealing very hardly with two counsel to say that there was any serious imputation against them, merely because they happened to take the form of a *decreet arbitral*, though the transaction was in reality an agreement.* We have heard much

Question,
 whether this
 is a valid sub-
 mission and
 award.

No ground of
 imputation
 against the
 counsel who
 acted as arbi-
 ters.

York Build-
 ing Company

* The opinion seems to have been entertained by some of the most eminent men at the Scotch bar, that a *decreet arbitral*

April 9, 1816.

DECREET AR-
BITRAL
(AWARD),
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CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

v. Mackenzie,
8 Bro. P. C.
per Tomlins,
42.

Duties of ar-
biters.

of the case of Mackenzie ; I well recollect that Lord Thurlow never thought that there was any ground of reflection on the conduct of Mackenzie. I think I was counsel in the cause ; and it was a surprise upon us that the imputation was made, as it had been stated that one of the Judges of the Court of Session had purchased property sold in the course of a cause in which he had acted as Judge. But this House thought, upon a great principle applicable to the high as well as the low, as persons in these situations had an opportunity of knowing a great deal more about the subject than others, of which, though honourable men would not, yet men less scrupulous might, take an improper advantage ; that persons in such circumstances ought not to be permitted to deal for the property at all.

When I come now to consider whether this was, or was not, a proper decret arbitral, permit me to say that arbiters ought to go into the room as judges, and that though one is chosen by one party, and another by another, each is not to act merely for the interest of the party by whom he is named. Arbiters, by whomsoever named, ought to be perfectly indifferent between the parties, and owe to the particular parties duties of the same nature as

might be properly used to carry an agreement into execution, and might be valid as such though so used. Vid. Routledge v. Carruthers, *post*, for a decret arbitral of this sort by Mr. Ferguson, afterwards Lord Pitfour, and Mr. Lockart, advocates. This circumstance might perhaps account for and explain the proceeding of Sir Ilay Campbell and Mr. Wight, without any necessity for the slightest imputation in a moral sense, even though their character had not stood so high as it does.—P. D.

those which the King's Judges owe to his Majesty's April 9, 1816.
subjects in general, though not named by them.

Having premised these observations, I shall read
the judgment of 1782. The Lords found, " that
" the deed of tailzie, executed by the deceased
" Mr. Harry Maule of Kelly, with consent therein
" mentioned, in the year 1730, of the lands and
" estate of Kelly, and also the deed of tailzie ex-
" ecuted by the late William Earl of Panmure, in
" the aforesaid year, of his lands and estate of
" Ballumbie, are cut off by the positive and negative
" prescription ; and that the obligation for employ-
" ing 9000*l.* sterling, executed by the said William
" Earl of Panmure, in the aforesaid year, is cut off
" by the negative prescription. That the said
" William Earl of Panmure had full power to make
" the deed of tailzie, executed by him, in favour
" of the said Mr. William Ramsay Maule, and his
" administrator in law. That the said Mr. William
" Ramsay Maule was entitled to be served heir of
" tailzie and provision to the said deceased William
" Earl of Panmure, his grand-uncle, in virtue of the
" foresaid deed of tailzie in his favour, and remitted
" to the macers to proceed in his service accordingly,
" on the brief brought before them by him and his
" administrator in law. *They farther found, that*
" *the said Lieutenant Thomas Maule had a right*
" *to take up the leases of the house and parks of*
" *Panmure, and house and parks of Brechin, and*
" *remitted to the macers to proceed in his service,*
" *in so far as regards these two leases ; but that*
" he was not entitled to be served heir male of
" tailzie and provision to the said William Earl of

DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

March 1, 1782.
Former judgment. Fac.
Col. vol. ix. p.
66.

April 9, 1816.

DECREET
ARBITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

“Panmure, in virtue of the deed of tailzie of the estate of Kelly, executed by the late Mr. Harry Maule, nor in virtue of the deed of tailzie of the estate of Ballumbie, executed by the said William Earl of Panmure; and that his service on the brief taken out by him could not proceed with regard to the said estates of Kelly and Ballumbie; and remitted to the macers to dismiss the same accordingly, in so far as concerned these two estates.” So that this interlocutor finds, that Thomas Maule was entitled to take up the leases of the houses and parks of Panmure and Brechin, which leases were represented as being of the value of 50,000*l.*; but whether the value was 50,000*l.* or 50*l.*, is, as to the present purpose, immaterial.

Evidence as to the question whether this was a valid decret arbitral.

This being the judgment of the Court of Session, the Earl of Dalhousie appealed to this House, and that fact is noticed in the letter of March 24, 1782, written by Mr. Wight, which is material. The letter is in these words:—“I have received yours, and I am sorry you should have put yourself to the expense of an express, on the subject to which it relates. It was understood between *us* that Lord Dalhousie should enter his appeal, so that, in all events, the matter might be determined this Session, in case we did not agree.” These words, “it was understood between *us*,” do not mean that it was understood between Mr. Wight and his client, Lieutenant Maule, but between Mr. Wight and some other person; and another, and not Lieutenant Maule, was alluded to in the words, “in case *we* did not agree.” Then the letter proceeds—“but if Leslie had been at home, there

“ would have been no attempt at a service ; that ^{April 9, 1816.}
 “ has proceeded from a mistake in his clerk. But
 “ you may be perfectly easy. Mr. Ferguson and I
 “ have your interest at heart, and you may depend
 “ upon us. I am only to ask of you not to trouble
 “ yourself about any thing, till we see you.” And
 then there is a postscript with the words “ flurried a
 “ little,” which seem to be of no consequence.

DECREET
 ARBITRAL
 (AWARD),
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 SUCH, IF
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 CLOAK FOR A
 TRANSACTION
 OF A
 DIFFERENT
 NATURE.

Then Mr. Wight writes another letter of March
 29, 1782, which, let it be observed, was the day
 before the submission was executed. “ I have
 “ spent three hours with Mr. Campbell this fore-
 “ noon ; and the utmost length that they will go,
 “ is to give 3500*l.* for the leases. I wished much
 “ to bring them higher, and struggled hard for
 “ their coming the length of 4000*l.* ; but they are
 “ resolved not to give a sixpence more. Whatever
 “ others may think, I am most clearly of opinion
 “ that, in your situation, you ought to accept of
 “ this offer, rather than run the risk of losing all ;
 “ the more especially, as Lord Dalhousie agrees to
 “ give up any claim he has by the entail ; without
 “ which, in the event of your own and your son’s
 “ death, he would exclude your daughters. I was
 “ surprised to learn just now, that Mr. Crosbie was
 “ drawing a case for the house of Lords, upon the
 “ idea that the appeal was to proceed : I therefore
 “ beg you will let me know whether you mean to
 “ end upon the terms proposed by the other party,
 “ as they expect a speedy answer.” [This last letter
 is indorsed in the hand-writing of Lieutenant
 Maule.] “ Mr. Wight, March 29, 1782, settling
 “ with Ilay Campbell ; pushing to close.”

“ Flurried a
 “ little.” The
 letter was
 dated March
 24, 1782, 12
 at night.

April 9, 1816.

DECREET
ARBITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

Unless the
award was
the judgment
of both, it was
the judgment
of neither.

From this, it is obvious that Mr. Wight, in his previous letter, by the expressions, "it was under-
"stood between *us*;" and "in case *we* did not
"agree," alluded to Mr. Campbell: but they did
not act consistently with the principles of arbitra-
tion, unless the award was the judgment of both;
for if it was not the judgment of both, it was the
judgment of neither. Mr. Wight says, "I have
"spent three hours with Mr. Campbell this fore-
"noon; and the utmost length they will go is
"to give 3,500*l.* for the leases. I wished much to
"bring them higher, and struggled hard for their
"coming the length of 4000*l.*; but they are re-
"solved not to give a sixpence more. Whatever
"others may think, I am most clearly of opinion
"that, in your situation, you ought to accept this
"*offer*, &c." so that this sum of 3,500*l.* was pro-
posed by the other arbiter. Do I characterize this
too highly, when I say that Mr. Wight and Sir
Ilay Campbell had been spending these three hours
in determining what the one should take and the
other give for the title which Thomas Maule had
under the interlocutor of the Court of Session,
pronounced chiefly in consequence of the influence
of Lord Braxfield's opinion; the one struggling for
4000*l.*, or a higher sum than 3,500*l.*; the other
offering 3,500*l.*, and refusing to give more? And
Mr. Wight then states his opinion that Maule
ought to accept the *offer*, that is, the offer to give
3,500*l.* for the title; for, though words are not to
be strained, they must be construed according to
their common meaning and natural import. Mr.
Wight also says, in his letter, "I beg you will

"let me know whether you mean to end upon April 9, 1816.
 "the terms proposed by the other party." Was
 not this, then, a proposal by the other party? and
 Mr. Wight tells Maule that they expected a speedy
 answer.

DECREET AR-
 BITRAL
 (AWARD),
 NOT VALID AS
 SUCH, IF
 USED AS A
 CLOAK FOR A
 TRANSACTION OF A
 DIFFERENT
 NATURE.

The submission was dated March 30, and the scroll of it has been recovered. Your Lordships will recollect that it was prepared by Leslie, as to whom it had been stated by Mr. Wight, in his letter of March 24, speaking of the appeal, that if he (Leslie) had been at home there would have been no attempt at a service. So the scroll was prepared by Leslie; and this could not have been done so early, unless a speedy answer had been returned by Lieutenant Maule. The scroll was afterwards altered and corrected by Sir Ilay Campbell, and the submission was drawn out thus:—after narrating the actions brought, and the interlocutor of 1782, it goes on—

"But to avoid farther proceedings at law, the
 "parties have agreed to settle matters by arbitra-
 "tion; therefore, the said George Earl of Dalhousie,
 "for himself, and as administrator-in-law for his
 "second son, the honourable William Ramsay
 "Maule, and for his whole other children, and the
 "honourable Lieutenant Colonel Malcolm Ramsay,
 "his Lordship's brother, on the one part; and
 "Thomas Maule, for himself, and as administrator-
 "in-law for (the Appellant) William Maule, his only
 "son, on the other part; have submitted and re-
 "ferred, and do hereby submit and refer, to the
 "amicable decision and final sentence and decreet
 "arbitral of Mr. Alexander Wight and Mr. Ilay

Submission,
 March 30,
 1782.

April 9, 1816.

DECREET AR-
BITRAL
(AWARD),
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TRANSACTION OF A
DIFFERENT
NATURE.

" Campbell, advocates, arbiters mutually chosen
" by the said parties submitters ; and in case of vari-
" ance between the said arbiters, to the honourable
" Robert M'Queen, Esq." (that is, the very gentle-
man by whose influence the interlocutor in favour
of Lieutenant Maule had been pronounced, he
acting only in case of variance between the
arbiters), " one of the Senators of the College of
" Justice, oversman, mutually elected by the said
" parties, all questions between them, or which
" either of them may or can have with the other,
" in relation to the premises, and particularly the
" whole of the said processes and claims, with the
" interlocutor thereon pronounced, and appeal there-
" on entered ; and cross appeal, competent to have
" been entered ; both of which are hereby agreed
" to be departed from : with full powers to the said
" arbiters, and, in case of variance, to the said
" oversman, to take in the different claims and
" allegations of the parties, and to receive all neces-
" sary proofs ; and, in general, to do every other
" thing else that shall appear to them proper and
" expedient, for determining on the matters herein
" submitted : and whatever the said arbiters, and,
" in case of variance between them, the said overs-
" man, shall decide, by decret arbitral to be pro-
" nounced by the said arbiters and oversman, be-
" tween and the 8th day of April next to come,
" the said parties submitters, for themselves, and as
" administrators-in-law, and taking burden on them
" respectively, as aforesaid, bind and oblige them
" and their said children, and their heirs and ex-
" ecutors, to acquiesce in, implement, and perform,

“under the penalty of 100*l.* sterling, over and April 9, 1816.
 “above performance.” Then follows a clause of re-
 gistration, &c.

DECREET AR-
 BITRAL
 (AWARD),
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 TRANSACTION OF A
 DIFFERENT
 NATURE.

The scroll had been drawn out by Leslie, from some information or conjecture as to what the parties meant, as a verbal agreement entered into between the Counsel for the parties, between the afternoon of March 29 and 30; and the arbiters afterwards, on April 2d following, somehow or other, do the very thing which Leslie had considered as having been agreed upon. This scroll, as I before stated, was laid before Sir Ilay Campbell, and he made out the instrument of submission.

The arbiters then proceed to the execution of their duty, and make their award as early as the 2d of April. It was a question of some difficulty, one would imagine, whether the decision of the Court of Session in favour of Thomas Maule, produced, as was stated, chiefly by the influence of Lord Braxfield, the oversman, ought to be recalled; but in two days they decide that the judgment was wrong, Braxfield, the oversman, having said that it was right. They find that the leases were at an end, in consequence of the Earl of Panmure having purchased the property, and that the tailzies of them executed in 1730 were at any rate cut off and extinguished by prescription, and were not subsisting deeds, and they reduced the same; and so far altered the interlocutor of March 1, 1782, but adhered to it in all other points; that is, they made it in all respects favourable to Lord Dalhousie, and unfavourable to Mr. Thomas Maule. I speak with reserve; but I have no conception that the Courts

April 9, 1816. here would permit arbiters to go this length; for I say that they ought to have been both for and against Lord Dalhousie, and both for and against the other party. But what they do is to give Lord Dalhousie every thing, and Lieutenant Maule nothing. Then they proceed to state that they thought it just and reasonable that T. Maule, though not entitled to make any legal claim, should have a provision in money settled on him and his heirs undermentioned, in consideration of their having deprived him and them of the benefit of the leases. Permit me to call your Lordships' attention for a moment to the letter of Mr. Wight, of March 29, in which he states that the utmost length he could bring them to was to give 3,500*l*. The arbiters then ordain Lord Dalhousie to make payment to T. Maule and his heirs of the sum of 3,500*l*.; that is, the sum which Mr. Wight said the other party had offered; 500*l*. thereof to T. Maule immediately, the remaining 3000*l*. to be secured for the use of T. Maule and the persons in remainder, nearly as in the original scroll of the submission and the destination of the entails of the leases.

DECREET AR-
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NATURE.

Then we have on March 29 the counsel for the parties treating about the price to be allowed to T. Maule, in consideration of his giving up his claim; a price offered by the other party, and the proposal accepted; a scroll of submission drawn out, proceeding on the narrative of a treaty between the parties; of a verbal agreement, and the terms of the agreement. That scroll was indeed afterwards altered so as to make it an ordinary submission. The submission was executed on March 30; Lord Brax-

field, by the influence of whose opinion the judgment of 1782 with respect to the leases had been obtained, being made oversman. The award was to be made by April 8, and is made on April 2, carrying the agreement into execution according to the terms mentioned in the letters of Mr. Wight, and in the scroll of the submission. Why then, though, as I said before, I do not think there is any ground of imputation against the arbiters in this case, yet, upon every consideration of justice and right, I must deal with this as with other cases; and I cannot represent the transaction to my own mind, especially when considering it with reference to the interests of the son of Lieutenant Maule, in any other light than as an agreement executed under the colour of a decree arbitral; and I can, therefore, look upon this neither as a valid submission nor a valid decree arbitral. As to the consequences of this opinion, I do not enter upon that consideration now, as the Court below has decided only upon the ground that this was a valid decree arbitral; but, however I may regret my differing from the majority of the Court of Session, I protest I cannot bring my mind to consider this as a valid submission and decree arbitral.

Then we have been called upon to decide upon the whole case immediately. That however we cannot do, as the Court below has given no opinion except as to the validity of the decree arbitral; and if your Lordships concur in the opinion which I have stated, we may declare that this is not a valid decree arbitral, and remit the cause as to the other points.

Lord Redesdale. The mode proposed by the

April 9, 1816.
DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
USED AS A
CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

This not a decree arbitral, but an agreement.

April 9, 1816. noble Lord does appear to be the only proper way of dealing with the case as it comes before us.

DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
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CLOAK FOR A
TRANSACTION OF A
DIFFERENT
NATURE.

The question here is simply this ; whether the instruments, in the forms of a submission and decret arbitral, are in reality what they are in form. If they are, then they are binding as such. The object of the suit by the Appellant was to reduce this decret arbitral, and the Court repelled the reasons of reduction, sustained the defences, assoilzied the Defenders, and decerned. Now it does appear to me perfectly clear that the instruments, under the form of a submission and decret arbitral, were not, in the view of the parties, in reality the instruments of which the shape was so assumed. For it is clear, from the proceedings of the parties, that they were not dealing in the mode of arbitration, but in the way of contract or agreement, to give up the title for a certain sum of money. Whether this transaction is binding as a contract, is a question not now before us to determine ; the simple question being whether it can be sustained as a decret arbitral. If this had been, in form, a contract, or transaction of any other description, to abandon the rights of one of the parties, it could not be stronger than in this case, as there was no discussion of the rights of the parties by the arbiters, who proceeded on the grounds of the contract or agreement previously concluded between themselves on behalf of the parties, as is completely manifest from the letters of Mr. Wight, and from the scroll of the submission, where it was actually stated that the matter had been previously settled by agreement, though that

was afterwards struck out. I, therefore, perfectly concur with the noble Lord that the decision of the Court below, finding that this should have effect as a decret arbitral, ought to be reversed. But it is too much for your Lordships at present to decide finally upon the whole case.

DECREET AR-
BITRAL
(AWARD),
NOT VALID AS
SUCH, IF
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CLOAK FOR A
TRANSA-
CTION OF A
DIFFERENT
NATURE.

The formal judgment was as follows :—

“ The Lords *find*, that in this action and proceed-
“ ing between the present Appellant and Respond-
“ ent, the alleged submission and decret arbitral of
“ the 30th March and 2d April, 1782, ought not to
“ be considered as having in law the effect of a sub-
“ mission or decret arbitral, but as a form adopted,
“ by which an agreement previously made between
“ Thomas Maule, the Appellant’s father, and George
“ Earl of Dalhousie, parties to the said submission,
“ was concluded : and with this finding, it is ordered
“ that the cause be remitted back to the Court of
“ Session, to review the interlocutor complained of,
“ and to do therein as is just and consistent with
“ this finding.”

May 10, 1816.
Formal judg-
ment.

Agent for Appellant, SMITH.
Agent for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1ST DIVISION).

MRS. ANNE ROUTLEDGE, otherwise }
 MAJENDIE, and her husband, the } *Appellants.*
 LORD BISHOP OF BANGOR }
 CARRUTHERS and another—*Respondents.*

May 5, 7;
 June 29, 1816.

LEGITIMACY.

—DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?

A., by his marriage contract, settles lands, on failure of heirs male, on the heirs female of the marriage, and the heirs male of their bodies; and cohabits ten years with his wife without issue. Wife misconducts herself, and divorce obtained, but is delivered of a female child, B., before the decree for the divorce. B. marries C., and with his consent renounces, for a sum of money, all claim under the contract, and dies before A., her presumed father. Held by the Court of Session that this renunciation was good against the son of B. *Sed per* Lord Eldon (C.), there is a difference between enabling a father to accelerate the implement of a contract by conveying the estate to his son or daughter (though he should afterwards obtain a re-conveyance), and laying down a rule by which an opulent father, without parting with the estate, may, by giving small sums of money to indigent persons who may become entitled, defeat the object of the contract any time he pleases: and the cause remitted for review to the division from which it came, with instructions to take the opinion of the other division.

In the course of the cause the legitimacy of B. was questioned; but *per* Lord Eldon (C.), concurring with the Judges below, the legitimacy of the child born *stante matrimonio* must be presumed.

Marriage,
 1731.

IN 1731, Francis Carruthers, of Dormont, married Margaret Maxwell, eldest daughter of Sir William

Maxwell, of Monreith; and in 1735 a post-nuptial contract of marriage was entered into between the husband of the one part, and the wife, with advice and consent of the trustees for her brother, of the other part; whereby, in consideration of the marriage and the wife's portion, Francis Carruthers bound himself, his heirs, &c. to make up titles to the estates, and to infest Mrs. Carruthers in life-rent in a yearly annuity of 1,600 marks, &c., and to make due and lawful resignation of the estate of Dormont, and for new infestment of the same to be made and granted to Francis Carruthers himself, and the heirs male lawfully to be procreated betwixt him and the said Mrs. Margaret Maxwell his spouse; whom failing, the heirs male of the said Francis Carruthers, his body in any subsequent marriage; whom failing, the heirs female to be procreated betwixt the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her always excluding the rest, and succeeding without division; whom all failing, to the said Francis Carruthers his heirs and assignees whatsoever. And then, in case the daughters of this marriage should be excluded by heirs male of the body of Francis Carruthers in any subsequent marriage, there was a provision that the daughter, if there should be only one, should have 18,000 marks; and if two or more, that they should have 20,000 marks, Scots money, to be divided as the father should think proper; and, if he made no division, then to be equally divided, &c. at the first term of Whitsunday or Martinmas after their respective majorities or marriage which should first happen.

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Marriage con-
tract, 1735.

Heirs under
the contract.

Provision for
daughters in
case there
should be
heirs male.

May 5, 7;
June 29, 1816.

LEGITIMACY,
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

In implement of the first obligation in this contract, Francis Carruthers made up titles to the estates in such a way as to vest in himself and his heirs the fee simple. These titles were completed in 1740. It was contended in the course of the cause that this contract was a contravention of an entail of 1708, made on occasion of the marriage of one of the Carruthers, of Dormont, with Mary Bell, of Winterhophead. But it is unnecessary, in the present state of the cause, to consider that entail more particularly, as it was not noticed by the Lord Chancellor; the judgment of the Court below having turned upon another ground.

Female child
born May 28,
1741.

For ten years there was no appearance of issue of the marriage; but on May 28, 1741, Mrs. Carruthers brought forth a female child, which was disowned by Mr. Carruthers, who had raised a process of divorce against his wife for adultery some months before the birth of this child. On Jan. 9, 1742, about seven months after the birth of the child, he obtained a decree in that action. It was stated in one of the cases that Mr. Carruthers had gone into England in the beginning of August, 1740, at which time Mrs. Carruthers was, as the husband had informed his counsel he was able to prove, in a situation in which women are not when with child; and it was stated also, that Mr. Carruthers had been advised by counsel to raise a declarator of bastardy, to ascertain the illegitimacy of the child, which however was not done. Mr. Carruthers defrayed the expense of the girl's aliment till she was seven years of age; and then she was, by his orders, sent to the house of a farmer in Cumberland, or Northumber-

Divorce.

Alleged illegitimacy of the child.

land, where she remained till August, 1758, when she married Henry Routledge, the son of a neighbouring farmer.

In 1758 Mrs. Routledge and her husband raised an action against Mr. Carruthers, for implement of the obligation, in the contract of 1735, to pay 1000*l.* to the daughter on her marriage. The defence was that Mrs. Routledge was not the daughter of Mrs. Carruthers; and Mrs. Routledge was ordained to give in a condescendence of the facts alleged by her, tending to show that she was the daughter of Margaret Maxwell, born, *stante matrimonio*, betwixt Mr. Carruthers and the said Margaret. A condescendence was given in, and a proof adduced, establishing that Mrs. Carruthers was delivered of a female child on May 28, 1741; that the Pursuer was that person; and that she was the lawful wife of Henry Routledge. When the cause was in this state, the parties agreed to settle matters without further legal proceedings, and a contract, dated Oct. 26, 1759, was entered into between Mr. Carruthers, Mr. Routledge (taking burthen upon him for his wife), and Mr. James Ewart, accountant to the Bank of Scotland, a creditor of Routledge, and assignee of Routledge's claims on Mr. Carruthers; whereby Routledge and Ewart engaged that Mr. and Mrs. Routledge should renounce all claim under the marriage contract of 1735, competent to Mrs. Routledge, or any one deriving right from her, in consideration of 650*l.* which Mr. Carruthers agreed to pay. In order to carry this agreement into execution, a submission, dated Nov. 30, 1759, in which Mr. and Mrs. Routledge, Mr. Ewart, and Mr. Carruthers,

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

August 1758.
Marriage of
the daughter.
1758. Action
by the daugh-
ter and her
husband.
Defence.

Arrangement
of 1759.

Arbitration.

May 5, 7;
June 29, 1816.

LEGITIMACY.

—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Renunciation
by the daugh-
ter.

Dec. 8, 1759.
Disposition
under which
Respondent
claimed.

Death of the
daughter be-
fore her pre-
sumed father.

were the parties, was entered into, and the matters in difference referred to the arbitration of Mr. Fergusson of Pitfour, and Mr. Alexander Lockhart, advocates; and a decret arbitral was made, Dec. 7, 1759, pursuant to the contract. On the same day a discharge and renunciation was executed by Mr. and Mrs. Routledge, and Mr. Ewart their assignee, of all claims in virtue of the marriage-contract of 1735; and on the next day, Dec. 8, 1759, Mr. Carruthers executed a disposition of his estate in favour of himself and the heirs male of his body; whom failing, in favour of his brother, William Carruthers, and the heirs male of his body; whom failing, to his own nearest heirs male whatsoever; and, upon the procuratory in this disposition, obtained a crown charter. Mrs. Routledge was under age at the time of the renunciation, and died, without having ratified it, in 1768. Her husband died soon after, and Francis Carruthers died in 1773, or beginning of 1774, and was succeeded by his brother William, who entailed the estates on himself; whom failing, on his eldest son, William Aikman Carruthers, and the heirs male of his body; whom failing, on his second son, and the heirs male of his body, &c. William died in 1787, and was succeeded by his eldest son, William Aikman Carruthers, who died in 1802, and was succeeded by his son, William Thomas Carruthers, the Respondent.

1806. Action
by the son of
the daughter
to set aside the
disposition of
1759.

There were three children of the marriage between Mr. and Mrs. Routledge, a son and two daughters. The son, in 1806, served himself heir of provision, before the Magistrates of Canongate, to Francis Carruthers, of Dormont, in terms of the marriage-

contract, and brought an action for setting aside the ^{May 5, 7;} disposition of 1759, and subsequent conveyances, ^{June 29, 1816.} on the grounds:—1st, that they were in face of, ^{LEGITIMACY.} and in direct contradiction to, the destination and ^{—DAUGHTER,} obligations in the marriage-contract of 1735, ^{FOR A SUM OF} in favour of the heirs of the marriage; 2dly, ^{MONEY, RE-} That they were executed in face of letters of ^{NOUNCES TO} inhibition, raised by Sir William Maxwell, &c.; ^{HER FATHER} 3dly, That his mother having predeceased Mr. ^{HER CLAIMS} Francis Carruthers, who died without having mar- ^{UNDER HIS} ried a second time, the writs called for had been ^{MARRIAGE-} executed in defraud, hurt, and prejudice of his just ^{CONTRACT,} rights as the heir served, and retoured under the ^{AND DIES IN} contract 1735. In order to bring forward the de- ^{HIS LIFE-} fence in the most convenient form, a counter-action ^{TIME.—WHAT} was brought by the Respondent, to set aside the ser- ^{IS THE EFFECT} vice before the Magistrates of Canongate, as clan- ^{OF THE RE-} destinely and irregularly obtained; this was con- ^{NUNCIATION?} joined with the principal action. In the course of the proceedings the pursuer, Routledge, died; and his sister Mrs. Ann Routledge, otherwise Majendie, wife of the Lord Bishop of Bangor, and her husband, for his interest, sisted themselves as parties in the cause, and are the present Appellants.

In defence to the principal action it was at first ^{Defence.} insisted that the pursuers had no title to pursue:— ^{Illegitimacy.} 1st, Because Mrs. Routledge, the mother, was not the lawful daughter of Francis Carruthers: 2dly, That she was not the child of which Mrs. Carruthers had been delivered in 1741. To the first point it was answered that, for any thing that appeared in evidence, Francis Carruthers might have cohabited; and must be presumed to have co-

May 5, 7;
June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Chief defence.
Renunciation
of 1759.

habited, with his wife from the day of their marriage to the final separation; and that "*pater est quem nuptiæ demonstrant*:" and as to the second point, it was answered that the identity of Mrs. Routledge was clearly established by the evidence. But the defence chiefly relied upon was, the settlement and discharge of 1759. The entail of 1708, under which the Respondent was said to be entitled, was also relied on; but this entail, as no opinion was given upon it, at least in the House of Lords, may be considered as at present out of the question. To the chief defence it was answered:—1st, That the discharge of 1759 only affected Mrs. Routledge's own right to succeed in the event of her surviving her father; 2dly, That Mrs. Routledge, who, at the time of granting this discharge, was not, and never afterwards became, the heir of the marriage, could not effectually discharge a right which never had belonged to her, to the prejudice of the true heir of the marriage.

All the Judges
below of opi-
nion that the
legitimacy
must be pre-
sumed.

The Lord Ordinary (Balmuto), and afterwards all the Judges of the first division, were of opinion that the preliminary defences could not be sustained, and that the legitimacy of Mrs. Routledge must be presumed; but the Lord Ordinary, by interlocutors of March 11, and July 11, 1807, sustained the defences founded on the submission, decret arbitral, and discharge of 1759. The Court, however (first division), by interlocutor of the 19th, signed February 21, 1811, sustained the reasons of reduction; but afterwards, by interlocutors of May 19, and 22, 1812, sustained the defences in the principal action, and repelled the defences in

Interlocutors,
1807.

Interlocutor,
1811.

Interlocutors,
1812.

the counter-action, and decerned. From the interlocutors of the Lord Ordinary, and the last two interlocutors of the Court, the Appellants appealed.

May 5, 7;
June 29, 1816.

It ought to be noticed that no action of reduction of the submission and decret arbitral had been brought, and that the Judges were, on May 19, 1812, equally divided, till Lord Armadale was called in, whose opinion was unfavourable to the Appellants.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN

The points argued for the Appellant were :—1st, that Mrs. Routledge renounced only her claim to the 1000*l.*, and her own chance of succession, and that the decret arbitral carried it no farther ; 2dly, Appeal.

HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

That the decret arbitral itself was a nullity, not being in reality what it purported to be ; 3dly, That Mrs. Routledge had no power to renounce more than her own chance of succession ; and on this, the great point in the cause, the cases of *Campbell v. Campbell*, Kaimes, Rem. Dec. Jan. 1742—*Hay v. Lord Tweeddale*, Stair, July 21, 1676—*Panton v. Irvine*, March, 1684—*Cairns v. Cairns*, Jan. 31, 1705—*Lyon v. Garden*, July 26, 1715—*Anderson v. Heirs of Shiells*, Nov. 16, 1747—*Maconochie v. Greenlees*, Jan. 12, 1780 ; and the opinion of Lord President Blair in the case of *Cunynghame*, Dec. 20, 1810, were cited.

For the Respondent, on this last point, were cited the case of *Stewart of Burgh*, 1728, affirmed in the House of Lords, 1729, (very imperfect as a precedent from its not being known whether the renouncing son did, or did not, survive the father)—*Edgar v. Maxwell*, 1756—*Traill v. Traill*, 1737—*Allardice v. Smart*, 1720—Case of *Sinclair of*

May 5, 7; *Southdean*, 1768—*Fotheringham v. Fotheringham*,
 June 29, 1816 1792—*Moncrieff v. Moncrieff*, 1759. It was con-

LEGITIMACY. tended for the Respondent that the object and effect
 —DAUGHTER, of the decret arbitral and renunciation were that
 FOR A SUM OF they should be a complete discharge of the obliga-
 MONEY, RE- tion in the marriage-contract, not only as to Mrs.
 NOUNCES TO Routledge, but as to all her descendants, substitute
 HER FATHER heirs of provision in the destination, and that no
 HER CLAIMS reduction of the decret arbitral had been attempted ;
 UNDER HIS that allegations made by the Appellants as to mino-
 MARRIAGE- rity, lesion, fraud, and oppression, were irrelevant,
 CONTRACT, as being *jus tertii* as to them, they not representing
 AND DIES IN Mrs. Routledge ; and were at any rate unfounded,
 HIS LIFE- &c. The entail of 1708 was also relied upon in
 TIME.—WHAT behalf of the Respondent, while it was contended
 IS THE EFFECT for the Appellant, that it was no-entail at all. But
 OF THE RE- for the reasons before-mentioned it is considered
 NUNCIATION? unnecessary here to notice it further.

Mr. Leach and *Mr. Horner* for the Appellants ;
Sir S. Romilly and *Mr. Clerk* for the Respondent.

June 29, 1816. *Lord Eldon* (C.) In this cause, which is one of
 Judgment. very great importance, Mrs. Ann Routledge, other-
 wise Majendie, wife of the Lord Bishop of Bangor,
 and her husband for his interest, are the Appellants ;
 and William Thomas Carruthers of Dormont, and
 James Carruthers his guardian, are the Respondents.
 It appears that in 1731, Francis Carruthers, of
 Dormont, married Margaret Maxwell, and that in
 Marriage-con- 1735 a marriage contract was made between them,
 tract, 1735. in which it was set forth that, in contemplation of
 the said marriage already solemnized, and tocher

after mentioned, the said Francis Carruthers bound and obliged himself to make up sufficient titles, in his person, to the estates after specified, and to infest his wife, Margaret Maxwell, in life rent, after his decease, in a yearly annuity of 1600 merks, to be restricted to 1000 merks in case of children procreate and existing at the dissolution of the marriage. The contract then proceeds to provide for, and secure, the heirs of the marriage as follows:—

“ And moreover in contemplation of the said marriage already solemnized, and tocher after mentioned, the said Francis Carruthers binds and obliges himself and his foresaids to make due and lawful resignation, &c., and for that effect he constitutes, &c. his lawful procurators, &c. to resign, and he by these presents resigns, &c. all and haill the five merks land of Dormont, all and haill the five pound lands of Twathats and Knox, &c. &c., in the hands of his immediate superiors thereof, or their commissions foresaid, in favour of, and for new infestment of the same to be made and granted to the said Mr. Francis Carruthers himself, and the heirs male lawfully to be procreated betwixt him and the said Mrs. Margaret Maxwell his spouse; whom failing, the heirs male of the said Francis Carruthers his body in any subsequent marriage; whom failing, the heirs female to be procreated betwixt the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her always excluding the rest, and succeeding without division; whom all failing, the said Francis Carruthers his heirs and

June 29, 1816.
 LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?
 Provisions for
 the heirs of
 the marriage.

June 29, 1816. " assignees whatsoever; with the burden always
 " of the said Mrs. Margaret Maxwell her life rent,
 " annuity above written, &c." And then by another
 clause certain provisions are destined to the daughter or daughters of the marriage, in case there should be no heir male of that marriage, and that the daughters should be excluded from the land estate by the existence of heirs male of a subsequent marriage. " And furthermore, in regard the
 " said Francis Carruthers his lands and estate, is
 " provided, failing heirs male of this marriage, to
 " the said Francis Carruthers his heirs male in any
 " subsequent marriage, whereby the daughters of
 " the present marriage may be excluded: there-
 " fore, and in that case, that the daughters of this
 " present marriage shall be excluded from the said
 " estate by the heirs male of the said Francis Carruthers his body in any subsequent marriage,
 " the said Francis binds and obliges him, his heirs
 " and successors, to content and pay to the daughters, one or more, to be procreate betwixt him
 " and the said Mrs. Margaret Maxwell, the sums
 " of money following, in full of all portion natural,
 " legitim, executry, or what else they might claim,
 " through the decease of the said Francis Carruthers and Mrs. Margaret Maxwell, viz:—If there
 " be but one daughter, the sum of 18,000 merks,
 " and if two or more the sum of 20,000 merks,
 " Scots money, to be divided among them as the
 " said Francis Carruthers shall think fit; and in
 " case of no such division by the father, to be divided equally after a *præcipuum* of 2000 merks
 " shall be set apart to the eldest daughter, and that

LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, REN-
 DOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DIES IN
 HIS LIFE-
 TIME. —WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?
 Provision for
 daughters in
 case of no
 heirs male.

“ at the first term of Whitsunday or Martinmas June 29, 1816.
 “ after their respective majorities or marriage LEGITIMACY.
 “ which shall first happen, with ten per cent. —DAUGHTER,
 “ of liquidate expenses, in case of failzie, and FOR A SUM OF
 “ annual rent of the said respective portions, so MONEY, RE-
 “ long as the same shall remain unpaid after the NOUNCES TO
 “ foresaid terms of payment; and the said Francis HER FATHER
 “ Carruthers binds and obliges him and his fore- HER CLAIMS
 “ says to furnish the said daughters with aliment, UNDER HIS
 “ clothing, and education, according to their degree, MARRIAGE-
 “ until the foresaid portions become payable.” CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Of this marriage there was issue one child, Elizabeth, born May 28, 1741. As to this child, whether legitimate or not, that is one point to be decided: and I concur with all the Judges below that, in law, she must be taken to be the legitimate daughter of Francis Carruthers. Child born before divorce obtained must be presumed to be legitimate.

This daughter was afterwards married to Henry Routledge, who brought an action in the Court of Session, concluding, “ that the said Elizabeth Carruthers being the only child of the said Francis, Marriage of the daughter to R. Routledge, and action for implement of the contract, 1735.
 “ procreated by him of the marriage with the said
 “ Margaret Maxwell his spouse, she is therefore entitled to the whole provisions in the said marriage contract contained; and therefore that the said Francis Carruthers, her father, ought and should be decerned and ordained to implement and perform to the said pursuer and her husband, for himself and his interest, the whole obligations, conditions, and provisions, incumbent upon and prestable by him, as in the said marriage-contract mentioned and conceived in her favours; and particularly to make payment of the aforesaid 1000*l*.

June 29, 1816. " sterling of money provision obliged to be paid to
 " her as the only daughter of the marriage, at the
 LEGITIMACY. " day of her marriage, which was August 13, 1758
 —DAUGHTER, " years, and annual rents from that day and in
 FOR A SUM OF " time coming during the non-payment: at least
 MONEY, RE- " the said defender should be decerned in payment
 NOUNCES TO " of the annual rents from the said day of marriage
 HER FATHER " and in time coming, &c."

HER CLAIMS " It appears that Francis Carruthers had brought a
 UNDER HIS process of divorce against his wife, and obtained a
 MARRIAGE divorce accordingly. It is unnecessary however to
 CONTRACT, go through the statement as to the legitimacy or il-
 AND DIES IN legitimacy of this child, as we must take her to be
 HIS LIFE- legitimate. But, in the course of the proceedings,
 TIME.—WHAT process of divorce against his wife, and obtained a
 IS THE EFFECT divorce accordingly. It is unnecessary however to
 OF THE RE- go through the statement as to the legitimacy or il-
 MUNCINATION? legitimacy of this child, as we must take her to be
 Divorce. legitimate. But, in the course of the proceedings,

Arrangement of 1759. an arrangement was made between the parties, and carried into effect by four different deeds. The first

Contract. was a contract between Henry Routledge and James
 Oct. 26, 1759. Ewart, accountant to the Royal Bank of Scotland, his creditor, on the one part, and Francis Carruthers of Dormont on the other. This contract, after reciting the marriage contract of 1735, and the claims made under it by Mrs. Routledge and her husband, proceeds thus:—" But, in order to remove
 " all claims or pretensions that they may have there-
 " upon, and also to remove and put a stop to all
 " processes they may have against one another, of
 " whatever kind or nature, they (that is, Mr. Routledge and Mr. Ewart on the one part, and Mr. Carruthers on the other) hereby agree, in manner after-mentioned, that is to say, the said Henry Routledge and James Ewart bind and oblige them, conjunctly and severally, their heirs, executors, and successors, that the said Elizabeth Carruthers, and

“ her said husband, shall except of 650*l.* sterling June 29, 1816.
 “ in full satisfaction of the whole provisions con-
 “ tained in the foresaid contract of marriage by LEGITIMACY.
 “ right of succession, or any other claim or demand —DAUGHTER,
 “ of whatever kind or nature, which the said Eliza- FOR A SUM OF
 “ beth Carruthers, or her foresaid husband, or her or MONEY, RE-
 “ their heirs, or the said James Ewart, or any other NOUNCES TO
 “ persons deriving right from them, can demand or HER FATHER
 “ pretend to in any manner of way, by virtue of HER CLAIMS
 “ the said contract of marriage, or any other ways UNDER HIS
 “ whatsoever, against the said Francis Carruthers, MARRIAGE-
 “ his heirs, executors, or assignees, now and for CONTRACT,
 “ ever. And in order that the said Francis Carru- AND DIES IN
 “ thers and his foresaids may be effectually secured HIS LIFE-
 “ against the same, or any future claim, that the TIME.—WHAT
 “ said Elizabeth Carruthers, her said husband, and IS THE EFFECT
 “ her or their foresaids, or the said James Ewart, OF THE RE-
 “ may make, they thereby bind and oblige them NUNCIATION?
 “ and their foresaids, that they shall execute and
 “ grant renunciations, or whatever deed or deeds in
 “ writing which shall be thought proper and neces-
 “ sary, by the said Francis Carruthers and his fore-
 “ saids, or their lawyers, to effectuate and secure
 “ the premises, and to exclude all claims or pre-
 “ tensions they or their foresaids can have against
 “ him or his above-mentioned: and whereas the
 “ said Elizabeth Carruthers is now a minor, the
 “ said Henry Routledge and James Ewart bind and
 “ oblige them, conjunctly and severally, their heirs,
 “ executors, and successors, that the said Elizabeth
 “ Carruthers shall, upon attaining to the years of
 “ majority, judicially ratify, and, if needful, renew
 “ the said renunciations or deeds, or any other deed
 “ or deeds in writing, that may be thought proper

June 29, 1816. " for the said purposes by the said Francis Carruthers or his foresaids, for their farther security
 LEGITIMACY. " concerning the premises; and they shall warrant
 —DAUGHTER, " the deeds to be granted as aforesaid to the fore-
 FOR A SUM OF " said Francis Carruthers and his foresaids, at all
 MONEY, RE- " hands, and against all deadly, as law will. And,
 NOUNCES TO " on the other part, the said Francis Carruthers
 HER FATHER " obliges him, his heirs, and successors, to pay to
 HER CLAIMS " the said Elizabeth Carruthers, Henry Routledge
 UNDER HIS " her husband, or to the said James Ewart, for
 MARRIAGE " their behoof, the foresaid sum of 650*l.* sterling,
 CONTRACT, " upon the day that the said deeds shall be delivered
 AND DIES IN " to him properly executed by the parties foresaid,
 HIS LIFE- " with the interest thereof, from the time of exe-
 TIME.—WHAT " cuting the deeds, during the not-payment thereof."
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?

This contract was executed at Dumfries, and bears date October 26, 1759. Mrs. Routledge herself was not a party to it; but her husband, taking burden for her, in conjunction with Ewart, his creditor, thereby engaged, 1st, that Mr. and Mrs. Routledge should renounce the provisions contained in her father's contract of marriage, and every claim or demand in virtue of it, competent to her or any person deriving right from her; 2dly, that the value of this abandonment of all her claims should be 650*l.* and no more; and it was agreed, that she and her husband should execute and grant renunciations, or whatever deed or deeds in writing, which should be thought proper and necessary by the said Francis Carruthers, or his foresaids, or their lawyers, to effectuate and secure the premises.

Arbitration.
Vid. ant.
 Maule v.
 Maule.

There followed on this a submission for a decret arbitral, a proceeding somewhat different from arbi-

tration in this country ; for here the grounds of dispute are referred to the arbitrators, and they determine on them. But it seems to have been not uncommon in Scotland for the parties to come to an agreement between themselves on the subject of the matters in difference, and then to put that agreement in the form of a submission and decreet arbitral, for the purpose of giving it effect as such. Accordingly, on Nov. 30, 1759, a submission was executed between Elizabeth Carruthers and Henry Routledge her husband, and James Ewart, of the one part, and Francis Carruthers, of Dormont, on the other, which sets forth the contract of marriage and previous proceedings ; and, after mentioning that the said Elizabeth Carruthers and her said husband had made over their claims in virtue of the said contract of marriage to James Ewart, accountant to the Royal Bank of Scotland, in security of certain sums due by the said Henry Routledge to him, it submits and refers “ to the final sentence and decree arbitral “ to be given and pronounced by Mr. James Ferguson of Pitfour, advocate, and Mr. Alexander Lockhart, advocate, arbiters mutually chosen by the “ said parties ; and, in case of their variance, by an “ oversman to be named by them, which they are “ hereby empowered to do, all questions, clags, “ claims, controversies, or demands of whatever “ nature, that either party has or can have against “ the other, and particularly all right or claim of succession, or other right or claim of whatever kind, “ which the said Elizabeth Carruthers and her said “ husband have or can pretend to, either now, or at “ any time, or in any event that may hereafter

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

Submission.
Nov. 30, 1759.

June 29, 1816. "happen, in virtue of the provisions mentioned in
 "the said contract of marriage in favour of the.
 LEGITIMACY. "children thereof, either with regard to the succes-
 —DAUGHTER, "sion of the estate of Dormont, and others, provided
 FOR A SUM OF "by the said contract to the heirs female of the said
 MONEY, RE- "marriage, or with regard to the provision of 1000l.
 NOUNCES TO "sterling to one daughter of the said marriage, in
 HER FATHER "the event of her being excluded from the succes-
 HER CLAIMS "sion of the said estate by an heir male of the body
 UNDER HIS "of the said Francis Carruthers of any other marri-
 MARRIAGE- "age, in manner mentioned in the said contract, or
 CONTRACT, "any claim which the said James Ewart has or can
 AND DIES IN "pretend to in right of the said Elizabeth Carru-
 HIS LIFE- "thers or Henry Routledge, or any other claim or
 TIME.—WHAT "demand which they or any of them have or may
 IS THE EFFECT "have against the said Francis Carruthers or his
 OF THE RE- "heirs, in any manner of way whatsoever."
 NUNCIATION?

The decreets arbitral, which have it for their object to carry these agreements into execution, are made very promptly; and accordingly, on Dec. 7, 1759, the arbiters by their decret arbitral, after reciting the deed of submission, and that they had considered the claims or demands of Elizabeth Carruthers against her father, and particularly any right or claim of succession, &c. ordained "the said Francis Carruthers to make payment to the said Elizabeth Carruthers, and to the said Henry Routledge, her husband for his interest, and to the said James Ewart in their name, as having right for them in manner before mentioned, of the sum of 650l. sterling, in full satisfaction to the said Elizabeth Carruthers and her said husband, and the said James Ewart, in their right, of all right

Decreet arbitral, Dec. 7, 1759.

“ of succession, or other right which they, or any of ^{June 29, 1816.}
 “ them, have, or can or may have, at any time, or
 “ in any event that may hereafter happen to the ^{LEGITIMACY.}
 “ said estate of Dormont and others foresaid, and ^{—DAUGHTER,}
 “ of the foresaid provisions to the children of the ^{FOR A SUM OF}
 “ marriage, in virtue of the foresaid contract; or any ^{MONEY, RE-}
 “ portion natural, executry, legitim, or whatever else ^{NOUNCES TO}
 “ the said Elizabeth Carruthers, her said husband, ^{HER FATHER}
 “ or the said James Ewart, in their right, may claim ^{HER CLAIMS}
 “ through the decease of the said Francis Carruthers, ^{UNDER HIS}
 “ and that betwixt and the 15th day of Dec. instant, ^{MARRIAGE-}
 “ with the legal interest of the said principal sum, ^{CONTRACT,}
 “ from the date of these presents, during the not ^{AND DIES IN}
 “ payment of the same. And, in the next place, we ^{HIS LIFE-}
 “ decern and ordain the said Elizabeth Carruthers ^{TIME.—WHAT}
 “ and the said Henry Routledge, for himself, his ^{IS THE EFFECT}
 “ own right and interest, and as taking burthen upon ^{OF THE RE-}
 “ him for his said spouse, and the said James ^{NUNCIATION?}
 “ Ewart, for his right and interest, and as taking
 “ burthen upon him for the said Elizabeth Carru-
 “ thers and Henry Routledge, to exoner, quit claim,
 “ and *simpliciter* discharge the said Francis Carru-
 “ thers, of all clags, claims, controversies, or de-
 “ mands, of whatsoever nature, which they, or any
 “ of them have, or can have, against the said Fran-
 “ cis Carruthers, for any cause or occasion preceding
 “ the date of the said submission; and particularly,
 “ to discharge, renounce, and overgive, in favour of
 “ the said Francis Carruthers, his heirs or assignees,
 “ all right or claim of succession, or other right or
 “ claim of whatever kind, which the said Elizabeth
 “ Carruthers, and her said husband, or the said
 “ James Ewart, in their right, have, or can pretend

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
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CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

“ to, either now, or any time, or in any event that
“ may happen after the date of the said submission;
“ in virtue of the provisions mentioned in said con-
“ tract of marriage, in favour of the children thereof,
“ either with regard to the succession of the estate of
“ Dormont and others before mentioned, provided
“ by the said contract to the heirs female of the said
“ marriage; or with regard to the provision of
“ 1000*l.* sterling, to one daughter of the said marri-
“ age, in the event of her being excluded from the
“ succession of the said estate by an heir male of the
“ body of the said Francis Carruthers of any other
“ marriage; and also, to renounce and discharge all
“ portion natural, legitim, excoentry, or whatever else
“ the said Elizabeth Carruthers, and her said hus-
“ band, or the said James Ewart, in their right, may
“ claim, or pretend to, by and through the decease
“ of the said Francis Carruthers; and for that
“ effect, to execute and deliver to the said Francis
“ Carruthers, or his foresaids, a valid, formal, and
“ effectual discharge and renunciation, in the terms
“ before-mentioned; containing a clause of absolute
“ warrandice by the said Elizabeth Carruthers, Henry
“ Routledge, and James Ewart, and all other clauses
“ necessary. And upon payment of the foresaid
“ sum, we decree and declare the said whole claims
“ to be discharged and renounced, and the said
“ Francis Carruthers, and his foresaids, to be free
“ thereof, and acquitted therefrom for ever.” I just
observe here that nothing is expressly said as to the
children of Mrs. Routledge.

Dec. 7, 1759.
Discharge by

On the day when this decree arbitral was signed,
a discharge and renunciation was obtained from Mrs.

Routledge, described as *Elizabeth Carruthers, only child procreate of the marriage* betwixt Francis Carruthers, and Margaret Maxwell, and from Henry Routledge her husband, and James Ewart, their assignee, which recites the terms of the decree, and then proceeds in these words: "Therefore, know ye, that I the said Elizabeth Carruthers, with the special advice and consent of my said husband; and I the said Henry Routledge, for myself, my own right and interest, and as taking burthen upon me for my said spouse, and we both, with mutual advice and consent; and I the said James Ewart, for my own right and interest, and as taking burthen upon me for the said Elizabeth Carruthers and Henry Routledge,—have exonerated and discharged, as we by these presents, exoner, quit claim, and *simpliciter* discharge the said Francis Carruthers, his heirs and successors, of all claims, claims, controversies, and demands, of whatever nature, which we or any of us have, or can have against the said Francis Carruthers, for any cause or occasion preceding the date of the said submission; and particularly, we, for our respective rights and interests, and as taking burthen, in manner before-mentioned, have discharged and renounced, and by these presents, discharge, renounce, and overgive, to, and in favour of the said Francis Carruthers, his heirs and assignees, all right of succession, or other right, which I the said Elizabeth Carruthers, and my said husband, or I the said James Ewart, in their right, have or can pretend to, either now or at any time, or in any event that may hereafter happen, in virtue of the pro-

June 29, 1816.
 LEGITIMACY.
 —DAUGHTER,
 FOR A SUM OF
 MONEY, RE-
 NOUNCES TO
 HER FATHER
 HER CLAIMS
 UNDER HIS
 MARRIAGE-
 CONTRACT,
 AND DEES IN
 HIS LIFE-
 TIME.—WHAT
 IS THE EFFECT
 OF THE RE-
 NUNCIATION?
 Mr. and Mrs.
 Routledge,
 and Mr.
 Ewart.

June 29, 1816.

LEGITIMACY.
— DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.— WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Marriage,
1731.

visions mentioned in the said contract of marriage,
in favours of the children thereof, either with
regard to the succession of the estate of Dormont,
and others before specified, provided by the fore-
said contract to the heirs female of the said marri-
age, or with regard to the sum of 1000*l*. sterling,
provided to one daughter of the said marriage, in
the event of her being excluded from the succession
of the said estate, by an heir male of the body of
the said Francis Carruthers, of any other marriage;
and also, to have renounced and discharged, as we,
by these presents, for our several rights and inter-
ests, and as taking burthen in manner foresaid,
renounce and discharge all portion natural; legitim,
executry, or whatever else I the said Elizabeth
Carruthers may claim or pretend to, by and
through the decease of the said Francis Carru-
thers, with all action or execution competent to us,
or any of us, concerning the premises."

Your Lordships will permit me here to mention
that it was contended, on the one hand, to have been
the intention of the parties in these proceedings, that
Mrs. Routledge should compromise, for this sum of
650*l*., not only her claim to the sum of 1000*l*. in
case there should be an heir male, but that the pro-
ceedings were intended as a discharge and renuncia-
tion of the succession of Elizabeth to the estate in
case there should be no heir male, and that too to
the extent of precluding any children of hers who
might be heirs under the contract from succeeding
to the estate, though she should predecease her
father.

The next day, Dec. 8, 1759, after the discharge

was granted, Mr. Carruthers executed a disposition of the estate of Dormont in favour of himself and the heirs male to be procreated of his body; whom failing, in favour of William Carruthers, his brother, and the heirs male of his body; whom failing, in favour of his own nearest heirs male whatsoever: and on the procuratory of resignation contained in this deed he was infeft.

June 29, 1816.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?
Death of Mrs.
Routledge be-
fore that of
her presumed
father.

Mrs. Routledge died in 1768, before Mr. Francis Carruthers of Dormont, who died in 1773 or 1774. Of the marriage between this Elizabeth and Mr. Routledge three children were born; a son and two daughters. John, the only son, being advised that he had right to the estates of Dormont, on Feb. 1, 1806, served himself heir to Francis Carruthers of Dormont, under the marriage-contract: and this was an action of reduction, at his instance, to set aside the disposition of Dec. 8, 1759, and subsequent conveyances, as being in direct contradiction to the obligations in the marriage-contract of 1735; contending, 1st, That it was never intended to renounce the right of Elizabeth to the succession in case there should be no heir male, but only her right to the 1000*l.* in case there should be an heir male; and 2d, That, as she was not heir in the life-time of her father Francis, she could not make a renunciation of the right; and if she could, she could renounce only her own right, and that she could not prevent her son from succeeding in the event of her dying before Francis Carruthers.

1806. Action
of reduction.

The action was commenced before the separation of the Court; but the cause was heard after that

Jan^y 29, 1816.

LEGITIMACY.

—DAUGHTER,

FOR A SUM OF

MONEY, RE-

NOUNCES TO

HER FATHER

HER CLAIMS

UNDER HIS

MARRIAGE-

CONTRACT,

AND DIES IN

HIS LIFE-

TIME.—WHAT

IS THE EFFECT

OF THE RE-

NUNCIATION?

First judg-

ment of the

Court. Four

Judges

against one,

that the action

was well

founded.

Reclaiming

petition, and

interlocutor

altered.

separation, before the first division, and it was decided by four Judges against one that the action was well founded; Lord President Blair being at the head of the four Judges, and stating that he was perfectly satisfied that Mr. Ferguson, afterwards Lord Pitfour, did not mean that Elizabeth should renounce, and would not have permitted her to renounce, more than her own interest in the 1000*l.* or in the estate; and that he was also clearly of opinion that, as she predeceased her father, her discharge could not affect the interest of her son.

A reclaiming petition was presented against this interlocutor, and a change of Judges had taken place in the interim. It appears that, on this second consideration of the cause, the Judges were equally divided till Lord Armadale was called in. The Lord President Blair had died; and the next President was of opinion that the parties did mean that the whole rights should be renounced, and that, though Mrs. Routledge died before her father, the renunciation operated so as to destroy the right of her son: and he compared it to this case, that, if the father had conveyed the estate to the daughter, he would thereby have implemented the contract; and if she then reconveyed to the father, that would bind her heirs, though she predeceased her father; and that so in this case, where the father parted with nothing, the renunciation of the daughter bound the son. Then the Lord Ordinary was called in, and carried it against the previous judgment. At the first hearing, therefore, the then Lord President and three other Judges, against one, were of opinion that the

action was well founded. At the last hearing three June 29, 1816. Judges were in favour of the former decision, and three against it, and the Lord Ordinary's casting vote carried it against the former judgment: and thus it stands as to judicial opinion.

This cause is important to the parties in point of value, and it is of very great consequence to the landed interest in Scotland. There is a wide difference between enabling a father to accelerate the implement of his marriage-contract, and laying down a rule by which an opulent father, by giving small sums to distressed persons who may become entitled to the succession under his marriage contract, may deprive them of their rights any day he pleases. Now this has been determined, that when a father parts in his life-time with the estate, and it is then re-conveyed to him, this binds the succession. And this also seems to have been determined, that if a child renouncing happens to outlive the father, in as much as the right of the individual renouncing has thus accrued, he and those coming after him are bound. But the distinction here is, that the daughter was not heir, but died before her father; and then the question is, whether there are cases where the renunciation of children in these circumstances, dying before the father, have been held effectual. A great variety of cases have been cited as authority for this, and especially that of Stewart of Burgh. That case has been particularly observed upon, as a decision of the House of Lords. But it is not certainly known whether in that case the son outlived the father; and it does not

LEGITIMACY.
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June 29, 1816. appear to me that the case was very fully considered; and, upon looking at it with accuracy, it may be found to be doubtful whether there are not circumstances in that case, distinguishing it from the present case, which have not yet been observed.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
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OF THE RE-
NUNCIATION?

Now I can take it upon me to say that this case has been examined with the most laborious attention by my noble friend (Lord Redesdale) and myself, and we have an inclination of opinion on the question, though I shall not at present intimate what it is: for your Lordships will recollect that we may do infinite mischief by deciding a case of this consequence before we clearly know what the Court below, looking at all the circumstances of the case, think the law to be. Considering therefore the importance of the subject in point of value to the parties; the importance of the question to the landed interest, and the weight of judicial authority on both sides, this does appear to me that very species of case contemplated by the statute dividing the Court of Session into two bodies, when it provided that, when cases proper to be remitted, such as this, arose, they should be remitted to the same division from which they came, but, by virtue of your authority, calling upon their brethren of the other division for their opinions. My humble advice therefore is, that this cause be remitted to the division from which it came, and that they should be required to call for the opinion of the other division according to the exigency of the statute; intimating however that I have no doubt as to the

Cause remitted to the first division, with instructions to call for the opinion of the second division.

legitimacy of the daughter, which is a point decided June 29, 1816. in the cause.

The cause was accordingly remitted for review, as to the principal point.

Agents for Appellants, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, CHALMER.

LEGITIMACY.
—DAUGHTER,
FOR A SUM OF
MONEY, RE-
NOUNCES TO
HER FATHER
HER CLAIMS
UNDER HIS
MARRIAGE-
CONTRACT,
AND DIES IN
HIS LIFE-
TIME.—WHAT
IS THE EFFECT
OF THE RE-
NUNCIATION?

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

DALY and another—*Appellants*.
KELLY—*Respondent*.

A. and B. claim under separate wills as devisees of C., and May 10, 1813. upon suit at the instance of A. the will in favour of B. Feb. 7, 1825; set aside, and that in favour of A. established. B. then May 21, 1816. sets up a bond of the devisor for 40,000*l.*, being more than the value of the whole property, on which bond he brings action at law and obtains judgment, whereupon A. amends his bill, and prays and obtains injunction to restrain execution.

MORTGAGE,
PENDING A
SUIT, &c.

A., after the will in his favour had been established, and before action on the bond, gives to D., his solicitor and attorney, a mortgage of the lands devised as a security for past and future costs in the proceedings, and for money advanced by D. to A. D. does not make himself a party, but suffers the suit to proceed in the name of A. as the sole plaintiff.

Decree in 1800 for payment of the sum in the bond, with interest from the time of the devisor's death instead of from its date, so that the bond was partly relieved against; and *per* Lord Redesdale afterwards in Dom. Proc. the bill must be understood as having submitted to have the relief

May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816.

MORTGAGEE,
PENDING A
SUIT, &c.

made effectual according to the rights of the parties. A. then compromises the suit, and refuses to appeal; and the whole property sold and purchased in trust for B. for a less sum than that reported due to him.

D. files his bill against A., B., and another; charging collusion and fraud, and praying that the decree of 1800 might be declared void as against him, and that he might be at liberty to appeal from it in the name of A. if that should appear to be for his advantage. Decided that the mortgage was valid as between D. and A., and that D. had a right to appeal in A.'s name. Appeal accordingly by D. in A.'s name in the cause A. v. B., and appeal against the decree authorizing that appeal.

The House of Lords, without deciding whether D. had a right to appeal in this way, refer back D.'s cause to the Court below for re-hearing, that the Court might decide whether D. might not impeach the decree in the cause A. v. B. to the extent of his claims, by bill in the nature of a bill of review or otherwise, though the same remained in force against A.

Bond, April
5, 1777, by
Denis Daly to
his son Mi-
chael.

DENIS DALY, of Montpleasant, in the county of Galway, was seized of a considerable settled real estate, and also seized and possessed of a large property, real and personal, unsettled. He had two sons, Denis and Michael, and three daughters. Previous to, and from the year 1777 till the time of his death in 1791, he was in a state of animosity with his first son Denis, and on April 5, 1777, executed a bond conditioned for payment of 40,000*l.* to his son Michael, a sum larger than the amount of his whole unsettled property. The bond was made payable in May following, but appeared not intended to be really payable till the father's death; and the father afterwards gave a bond for 5000*l.* to a favourite, and dealt in all respects with the property as if the bond to Michael had not existed:

and on this account it was afterwards contended that the father never meant that the bond should be obligatory at all, except in the event of his dying intestate, his object being at all events to exclude his first son from any share in the unsettled property. The anxiety of Michael to get a will made in his favour, and his paying the 5000*l.* bond when the person entitled challenged in chancery the will under which Michael afterwards claimed, though he (Michael) might as executor have retained, and thereby exhausted the whole fund, were also circumstances relied on to show that Michael himself did not consider the bond as obligatory. On the other hand there was evidence of the acknowledgment of the obligation in the bond by the father after he had made a will or wills, and a short time before his death. This bond, according to the statement of Michael in his answer to a bill in Chancery afterwards filed against him, after having been delivered to Michael and remaining some short time in his possession, was by him returned to his father, in whose custody till his death it continued uncanceled.

May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816.

MORTGAGE,
PENDING A
SUIT, &c.

In Feb. 1778, the year after the execution of the bond to Michael, Denis the father made a will, and thereby devised and bequeathed all his unsettled, real, and personal estates to his son Michael and his (Michael's) children.

First will of
D. Daly, Feb.
13, 1778, in
favour of Mi-
chael.

In 1790, he made another will, by which he devised and bequeathed all his real and personal estates to his grandson, Arthur Henry Daly, a younger son of Michael, subject to the payment of his debts and legacies.

July 20, 1790.
Will in favour
of Arthur
Henry Daly,
a younger son
of Michael.

May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816.

MORTGAGE,
PENDING A
SUIT, &c.

Mar. 13, 1791.
Will in favour
of Michael.

Solicitor ad-
vances money
to his client to
carry on his
suit, and to
maintain him
in the interim.

On March 13, 1791, the day before his death, he made a third will, devising and bequeathing all his unsettled real estates and personal property to his son Michael, who took possession accordingly, and possessed himself, among other things, of the 40,000*l.* bond.

Arthur Henry Daly, being led to believe that the will of 1791 had been obtained by undue means, was desirous to assert his right; but, having no funds to carry on the necessary proceedings, application was made to Kelly, a solicitor, who agreed to advance money to prosecute the suits, and to maintain A. H. Daly and his family in the mean time; and A. H. Daly, to secure Kelly, gave him bonds from time to time for the money advanced, on which judgments were entered up.

Will of 1791
set aside in the
Prerogative
Court.

In 1792, A. H. Daly proceeded in the Prerogative Court to have the probate granted to M. Daly under the will of 1791 revoked, to set that will aside, and to establish that of 1790. He prevailed in the suit, and the sentence was finally affirmed by the Court of Delegates in 1797.

1792. Bill in
Chancery.

In the same year 1792, A. H. Daly filed his bill in Chancery against Michael Daly and others, impeaching the will of 1791, on the ground that the testator, at the time of its alleged execution, lay dying, and in a state of insensibility; and praying, among other things, that the will might be set aside and that of 1790 established, and also that the bond for 40,000*l.* might be declared void, and delivered up to be cancelled, on the ground that the testator did not sign it with intent that it should be obligatory on him in the event of his making a will.

Michael, in his answer, insisted that the will of 1791 was valid; and that, in case it should be set aside, he had a right to set up the bond, which the testator had always admitted to be obligatory upon him; and then, alleging that the bond was payable at the time mentioned in it, May, 1777, he insisted that a sum of 73,000*l.* was due to him on the foot of the bond. An issue was directed, to try the validity of the will of 1791, and a verdict given against it, the effect of which was understood to be to establish that of 1790 in favour of A. H. Daly.

May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816.

MORTGAGE,
PENDING A
SUIT, &c.
Answer.

Issue.

Verdict
against will of
1791.

In this state of the proceedings A. H. Daly, by deed of mortgage, or what seems intended to have been, and was considered as a mortgage, of the date September, 14, 1795, conveyed and assigned to Kelly all the personal property, and the rents and profits of the real estates, devised and bequeathed to him by the will of 1790, to secure the payment of 6,336*l.* the amount of the judgments, and such other sums as should be advanced by Kelly, or become due to him for costs. This deed was duly registered.

1795. Mortgage by client to the solicitor, for securing the payment of costs and money advanced.

Registered.

The bond, which had been in the custody of the Court of Chancery during these proceedings, was delivered to Michael Daly, who, in Hilary Term, 1797 (stated to be in 1791 in one of the cases), brought his action on the bond on the Pleas-side of the Exchequer; and the fact of the execution of the bond not being contested, A. H. Daly, after having filed a general demurrer to the declaration, was advised not to proceed in defence, and judgment by consent was entered up for the Plaintiff. A. H. Daly then amended his bill, and prayed and

Action on the bond, H. T. 1797.

Action bond not defended.

May 10, 1813. obtained an injunction to restrain further proceedings at law on the bond and judgment.
 Feb. 7, 15, 25;
 May 21, 1816.

MORTGAGE,
 PENDING A
 SUIT, &c.

Injunction.

Decree,
 Mar. 7, 1800.

No interest
 allowed till
 testator's
 death.

The cause having been heard before Lord Chancellor Clare, his Lordship, on March 7, 1800, decreed that the bond should stand as a security for the principal sum of 40,000*l.* and interest from March 14, 1791, the time of the testator's death, and that the Master should take an account accordingly. The cause was re-heard, and in Nov. 1800, Lord Clare affirmed the original decree.

In May 1801, A. H. Daly executed a power of attorney, authorizing Kelly to lodge an appeal to the House of Lords; but, very soon afterwards, directed Kelly not to proceed with the appeal. Kelly then ceased to act for A. H. Daly. A report was made by consent that a sum of 55,906*l.* was due on the bond; and by a final decree, Feb. 17, 1802, this sum was decreed a charge on the real and personal estates of the obligor, which were directed to be sold. The property was accordingly put up to sale, and purchased by Richard Gore for 35,000*l.* in trust for Michael Daly.

Sale-purchase
 by Richard
 Gore in trust
 for M. Daly.

Nov. 1804.
 Bill by Kelly
 praying that
 the decree of
 1800 might be
 declared void
 as to him, and
 for liberty to
 appeal from it
 in A. H.
 Daly's name.

In 1804, Kelly exhibited his bill in Chancery against A. H. Daly, M. Daly, and R. Gore, stating these circumstances, and that a sum of 10,493*l.* was now due to him for costs and advances, and that A. H. Daly had, by a fraudulent and collusive compromise with M. Daly, declined to prosecute the suit by appeal to the House of Peers; and praying that the decree of March 7, 1800, and all subsequent proceedings thereon might be decreed and deemed void as against Kelly, and his right and title under the aforesaid mortgage and assignment,

&c.; and that he might be at liberty, if he chose, May 10, 1813.
 to carry on the proceedings in the cause of "*Daly*" Feb. 7, 18, 25 ;
 "*v. Daly*," by way of appeal or otherwise, in the May 21, 1816.
 name of Arthur M. Daly." After answer put in by MORTGAGEE,
 M. Daly, denying the fraud and collusion, and PENDING A
 stating that A. M. Daly had desisted from the suit SUIT, &c.
 in question at the intervention of his friends and Answer.
 from despair of success, Kelly moved the Court
 for liberty, as prayed by his bill, to lodge an appeal
 in the name of A. H. Daly, in the cause "*Daly v.*
Daly," as the time was almost out. The Lord Order, 1805,
 Chancellor (Redesdale), on August 21, 1805, made giving permis-
 an order intituled in both causes, giving liberty to sion to enter
 Kelly to enter an appeal accordingly, but without appeal.
 deciding the right; and this permission was to be
 "without prejudice to any question between the
 "parties, or to any objection which Michael Daly
 "might be advised to make to the prosecuting and
 "hearing such petition of appeal, Kelly undertaking
 "to pay any costs that might be awarded against
 "A. H. Daly, in consequence of the prosecution
 "of such petition; and it was further ordered that
 "A. H. Daly should be restrained from doing any
 "act to prevent such petition of appeal from being
 "presented and heard, or in any manner impeding
 "the same; and it was further ordered that Kelly
 "should forthwith speed his cause to a hearing, &c."
 The answer of A. H. Daly was put in after this order
 had been made, and denied fraud and collusion.

Kelly did not speed his own cause to a hearing,
 but suffered it to rest, and entered an appeal in
 "*Daly v. Daly*," in the name of A. H. Daly, ac-
 cording to permission. M. Daly, and A. H. Daly,

May 10, 1813. appealed from the order of permission, and, Michael Daly having died, the appeals were revived May 21, 1816.

MORTGAGE,
PENDING A
SUIT, &c.

Appeal, 1813.
Order that
Kelly's cause
be heard
below.

Decree, Jan.
30, 1813.
Mortgage
valid as
against A. H.
Daly.

Decree below
that Kelly
might appeal
in name of A.
H. Daly.

Appeal.

against John Sutherland, his legal personal representative. The appeals came on for hearing on May 10, 1813, but were ordered to stand over until the Court below, before which Kelly was directed to bring his own cause to a hearing, should decide on the validity of Kelly's security.

The Court, by decree of June 30, 1813, declared Kelly entitled as against A. H. Daly to the benefit of the mortgage of Sept. 14, 1795, for payment of the costs and advances; and that as it appeared that the mortgage security would be unavailable, in case the decree of March 7, 1800, in "*Daly v. Daly*" should stand and be in force; and as the only question to be determined was the validity and effect of the bond of April 5, 1777, being the point decided by the decree of March 7, 1800, from which an appeal had been lodged in the name of A. H. Daly; it was ordered that Kelly should be at liberty to prosecute the said appeal in the name of A. H. Daly; and that the account on the foot of the mortgage should be stayed till the appeal should be decided. From this decree A. H. Daly, and Sutherland representative of Mr. Daly, appealed.

The causes came on again for hearing in the House of Lords on Feb. 7, 1816.

For the Appellants (Daly and Sutherland) it was contended that the prosecution of an appeal from a decree in equity by one in the name of another, could not be defended on principle, and as to precedent there was none. This right of suing in the

name of another was confined entirely to cases at law, May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816. where, from the maxim that a *chose* in action could not be assigned, it was necessary that the assignee should be allowed to sue in the name of the original party. MORTGAGEE
PENDING A
SUIT, &c. The reason for permitting an assignee to sue in the name of the assignor there was, that the assignee could not proceed in his own name. That was not the case with Kelly, who, when he became a mortgagee, might have made himself a party. But this he neglected, and then attempted to prosecute an appeal in the name of another that other not wishing it. If Kelly had made himself a party by a supplemental bill, he might have prosecuted the appeal in his own name, as far as his interest was concerned. But, having neglected that, it would be a bad precedent if he were permitted to prosecute the appeal in this way. Kelly alleged fraud and collusion. If he could have proved that the decrees of Lord Clare had been obtained by fraud and collusion, he might have impeached them below on that ground. But no such thing was proved; and no fraud could be presumed, unless the decrees were so palpably erroneous that without fraud they could never have been made. The transaction with Kelly was unknown to Michael, and it was Kelly's fault that he did not assert his personal interest; and if the decree did not bind him against a new suit, how could he appeal against a decree by which he was not so bound?

The case of a solicitor advancing money for his client, and taking a security of this kind, without disclosing the interest which he had in the cause, was always regarded with suspicion, and not one

May 10, 1813. which ought to be favoured. A mortgagee before
 Feb. 7, 15, 25; the suit was a necessary party, without whom the
 May 21, 1816.

MORTGAGEE,
 PENDING A
 SUIT, &c.

Court, if informed of the circumstance, would not proceed. To such a mortgagee the *lis pendens* was, by the policy of the law, considered as notice; and if he neglected to prosecute his interest below, he could not come in upon appeal. A mortgagee, whose interest accrued pending the suit, was, upon the general policy of the law, not a necessary party; because, if he were, the mortgagor, by continually creating fresh incumbrances during the course of the cause, might prevent its ever being brought to a termination. But in regard to appeals, mortgagees of both descriptions stood on the same footing, and could not then for the first time come into the cause, the interest having commenced before, or pending, the suit below. It would be of dangerous consequence to permit persons with notice, and especially solicitors in the cause, thus to lay over and throw the whole burthen on another party, and then come in at the close and take the advantage.

For the Respondent Kelly it was contended that as it had now been decided that Kelly held a valid security, the compromise under the circumstances must have been fraudulent. Lord Redesdale, in 1805, had given permission to Kelly to appeal in A. H. Daly's name. (*Lord Eldon, C.* The difference is that the order of 1805 gives permission to enter the appeal, leaving to the Lords to decide the right; whereas the decree of 1813 decides that Kelly had the right to appeal. Could A. H. Daly have appealed on account of the alleged compromise,

and could Kelly appeal on any other ground than such as might have been taken by Daly, in whose name he appealed? Lord Manners has said that the mortgage is good as between A. H. Daly and Kelly, but he should have said whether it was good or bad as against Michael. Kelly's bill was founded on fraud, and charged collusion between A. H. Daly and Michael Daly; and, on that ground, prayed that Lord Clare's decree should be declared void as against Kelly. Did not that require judgment whether the mortgage was good as against Michael? There was fraud in preventing the judgment from being reviewed. The bill prayed relief in the alternative that the decree might be held not binding on him, or if so that he might be at liberty to appeal. Lord Redesdale, when he permitted it, must have been of opinion that he might do so, consistently with the rules of the Court. (*Lord Eldon, C.* Do you know any case where a *mesne incumbrancer, lite pendente*, who has not made himself a party has been allowed to appeal? and if fraud and collusion may be a ground for that, must not the fraud and collusion be proved? Was the land aliened before the bond was put in suit, or was there any question about the alienation in the cause "*Daly v. Daly*"?) The Court must have been aware of Kelly's interest. This was the case of a solicitor. Suppose a trustee refused to appeal against a decree, would that prevent the *cestui que trust* from appealing? No doubt the Court of Chancery would compel the trustee to permit his name to be used: and that is the case here, only that here there is an original bill to shew the interest. Kelly appeared

May 10, 1813.
Feb. 7, 15, 25;
May 21, 1816.

MORTGAGEE,
PENDING A
SUIT, &c.

May 10, 1813. in two characters, as solicitor and mortgagee. There
 Feb. 7, 1815, 25;
 May 21, 1816. were *dicta* at law that an attorney by whose industry
 and at whose expense property was recovered had a
 lien upon it, and that a settlement or alienation
 without his consent was a fraud on the attorney.
 And so here the compromise itself was evidence of
 fraud and collusion. This was in principle like the
 case of a creditor not proceeding with due diligence
 where other creditors might come in and conduct the
 suit.

MORTGAGEE,
 PENDING A
 SUIT, &c.

In reply it was contended that Lord Redesdale carefully avoided deciding the right to appeal. The whole foundation of Kelly's claim to appeal was the compromise. The answer had put him on proof of the fraud and collusion in that transaction. He had not proved it, and could not stir a step. The Court would say, You had a right to make yourself a party; and so it would in the case of a *cestui que trust*. The case of a creditor not proceeding with diligence did not at all apply. On the same principle that Kelly was bound to indemnify the other parties against the costs of the appeal, he ought to indemnify them also against the costs of all the proceedings since 1800.

Sir S. Romilly, Mr. Leach, and Mr. Heald, for Appellants; Mr. Hart and Mr. Johnstone for Respondent.

Feb. 7, 1816. *Lord Eldon (C.)* If I had not thought that a noble Lord (Redesdale), who usually attends here at the hearing of causes, would have been present this day, I would have advised your Lordships not to proceed so far with these appeals now, as I

profess that I feel extreme difficulty in understanding these Irish causes as they are presented to us. The state of the case, if I understand it, is something of this nature. The first question was whether Michael Daly was entitled, as devisee of Denis Daly, the testator, or Arthur Henry Daly as devisee of the same testator; and that question depended upon two wills. Michael said he was a bond creditor of his father the testator for 40,000*l*. Arthur's claim was established under the will, and Michael's bond was held to be a valid security. Arthur had filed a bill as to the wills, also bringing into contest the bond for 40,000*l*., and praying for an injunction to restrain proceedings at law upon it. Lord Clare thought that the bond was a valid security; and, generally speaking, the result would have been that the bill would have been dismissed as to the injunction. But probably it may appear on looking at the bill, which I have not been able to get at, that there had been some passage in the bill as to relief on the bond, which may afford ground for this mode of proceeding. It had occurred to me to put this question to myself, how the land would be affected by such a proceeding in law or equity here.

Feb. 7, 1816.
 MORTGAGES;
 PENDING A
 SUIT, &c.

For where a real estate is in the heir at law or devisee of a person dying indebted by bond, and that is aliened before action commenced on the bond, the land is not affected by the judgment, but the money received would be assets to pay the debt. It is stated in one of these cases that the action was not brought till H. T. 1797, and in another place that the action was brought before the bill was filed; and whether before or after may be a very material question.

Where a real estate is in the heir at law or devisee of one dying indebted by bond, and the estate is aliened before action brought on the bond, the land is not affected, but the alienor is liable for the value.

Feb. 7, 1816. Arthur was advised to bring the matter to a rehearing before Lord Clare, who affirmed his former decree; and so, on two hearings, this bond was held to be a valid security, which was an important circumstance with reference to the charge of collusion. As to the particular causes why Arthur had not appealed, I do not enter into the merits at present, as the question here must be decided on a drier ground. It is true the bill charges collusion, and your Lordships will attend to the distinction that it was not collusion up to Lord Clare's decree, but commencing after it, to prevent an appeal to this House. Then Kelly files an original bill, stating the incumbrance, as to which I shall only say at present that this House was well warranted in calling for the judgment of some Court as to the validity of that incumbrance before it proceeded further with the appeal, especially as that security was of a nature which Courts of Justice look at with great jealousy; and in March, 1813, the cause was ordered to stand over for that purpose. A motion had been made in Ireland that Kelly might be allowed to present a petition of appeal in the name of A. Daly; and that was allowed, as I understand it, because, if not allowed, it was questionable whether the petition could be presented in proper time, and the party could not otherwise, if the Court should think that the security was good, and that an appeal in this way was competent, have his relief, by reason, if I may use the expression, of the *ancientness* of his appeal. And so the order of 1805 was made. That amounts to no more than this: Here is a bill on account of this compromise, praying to have the benefit which the party would have

MORTGAGE,
PENDING A
SUIT, &c.

Mortgage by
client to soli-
citor or attor-
ney, of land in
litigation in
the cause,
regarded by
Courts of
Justice with
jealousy.

had if there had been no such compromise. It was ^{Feb. 7, 1816.} merely a permission to present the appeal before the time elapsed, leaving it to the Lords to say whether ^{MORTGAGE, PENDING A SUIT, &c.} this House would receive it. When that was considered in 1813, sufficient appeared on the face of the instrument of incumbrance to induce the House not to decide the case till they saw whether the instrument, which formed the ground of the demand, would be supported below. And the matter was accordingly deferred till the other cause was heard below ; and now there is a decree that the security is good as against Arthur H. Daly for the costs in the prosecution of his cause. I do not desire your Lordships to go into the question as to the merits in that respect ; that will be discussed hereafter. But, suppose for a moment that he had a right to this security on the land for past and future costs, the security must at least be regarded with a great deal of jealousy, because, when an attorney has such a security, there may not be so much caution in the expenses as would otherwise be applied. But, suppose the money has been actually advanced in behalf of Arthur H. Daly, there is not a word here as to the collusion ; but the decree merely asserts that the mortgage is valid as against A. H. Daly, and that Kelly ought to have liberty to appeal in the name of A. H. Daly : and the difficulty is not confined to this ; for you are placed in this difficulty also, whether you must not alter Lord Clare's decree, not only as far as respects the interest of Kelly, but whether you must not subvert it altogether with reference to the interest of A. H. Daly likewise, who is substantially no party here.

Feb. 7, 1816. Then is it the practice of a Court of Equity, or of this House, if pending a suit, an incumbrance is effected, and the incumbrancer is not made a party, that he should be at liberty to appeal in the name of the original parties? This at least is a novelty. If it were clear that a judgment was obtained by a fraudulent collusion, then there might be a ground for it; and further, if a person were acting in a cause for the benefit of another, and the parties by a fraudulent collusion deprived him of his fair remuneration, I can conceive that, if the collusion were established, relief ought to be given in some way, by either vacating the judgment, or that, if there was an appeal in this way, this House might perhaps receive it. But the first question is whether it is a fraud, the not appealing in behalf of a party who stands on the simple ground of being made an incumbrancer during the suit. Some other things are also to be considered. In one page it is said that the action was before the alienation, and in another that it was after. But, whoever got land before the action brought, by alienation from the devisee or heir at law of a dead person, the land cannot be affected by a bond creditor, but the money is assets for the payment; and here we may have to consider whether the bond would affect the land in the hands of Kelly at all. At law a bond attaches on the land by force of the judgment. But in equity the bond-creditor can only have satisfaction from the land in the mode of equitable execution; that is, by a sale of the land to pay the debt. But how can a sale be made without the party who has got the estate, and must make the conveyance?

**MORTGAGEE,
PENDING A
SUIT, &c.**

Then another question is, whether Kelly ought not Feb. 7, 1816.
to have been a party to the suit, and to have appealed
in his own name, confining it to his own interest, MORTGAGEE,
PENDING A
SUIT, &c.
instead of coming in the name of Arthur H. Daly.

I mention these things only to show the extreme difficulty which I feel in this case. Your Lordships know what valuable assistance we get in these Irish cases from a noble Lord not now here (Redesdale) even where the causes have not come before him below. He had this case before him, and knows more about it than the whole of the rest of us put together; certainly more than I do, for among these papers I cannot even find the bill, I propose, therefore, that the cause should stand over till that noble Lord can attend.

Lord Eldon (C.) The order of 1805 was made Feb. 15, 1816.
by the then Chancellor, to enable the party to enter his appeal in time, in case it should appear that he had merits, and had a right so to appeal. Then the cause came on here, in 1813; and the question was, whether Kelly had a right to appeal in the name of A. H. Daly, and if he had, whether he had any merits: and the order made on that occasion, according to the impression on my mind, was, that the Court of Chancery below should decide both questions, whether he had merits, and whether he had a right to appeal in this form. One of the difficulties which occurred to me in this case was, whether there was not an alienation of this property before any suit on the bond. It was likewise a singularity in the case, that this was a bill for an injunction to restrain proceedings at law on a bond;

Feb. 15, 1816.

MORTGAGE,
PENDING A
SUIT, &c.

and the consequence, generally speaking, when there appeared no ground for this injunction, would be that the bill as to that would be dismissed. But I stated before, that there might possibly be something in the pleadings to induce the Court below to retain the bill in that respect, and so to turn the Defendant into a Plaintiff. The cause now comes here on appeal against the order of 1805, and an appeal against this decree of 1813, and it was insisted that the Court was wrong in permitting the appeal; for there was little argument, as yet, as to the point, whether the mortgage to Kelly was a valid security, nor was it necessary in the first cause. But, in 1813, the House had doubts as to the validity of the security, considering its nature as between solicitor and client. But it would not be necessary to go into that, if the House should be of opinion against the appeal in the first cause. Now when we made the order of 1813, we did not, as far as the impression on my mind goes, mean to decide that Kelly had a right to appeal in the name of Daly; but expected the Court below to give its opinion, not only as to the merits, but whether, supposing there were merits, the party ought to be allowed to prosecute the suit in this form. I did not consider the order of 1805, as determining any thing but this, that the party should be at liberty to enter his appeal: I take it, at present, that the security was valid. But there is one thing to be observed, that this suit originated by a bill for an injunction to stay proceedings at law on a bond. When it appeared that the equity could not be sustained in that view, the ordinary course here

would have been to dismiss the bill. But I take Feb. 15, 1816.

it that there was some speciality in the case to induce the Court to retain it. There was another difficulty: if a bond creditor proceeds at law against a devisee, or heir at law, he takes execution against the land. But if he proceeds in Equity he only gets satisfaction out of the land by sale for as much as is due; and then the conveyance must be executed by him who has the legal estate; and if there is an alienation pending the suit, though that would not prejudice the Plaintiff, yet the alienance must be brought before the Court in some shape or other. Here, I take it, the course would be to bring the alienance before the Court in order to convey. But the course in this case has been different; for Kelly appeals in the name of Daly, who, though he has a much greater interest, repudiates the suit; and if the Court was of opinion that he could so appeal, the decree ought to have been that he should only appeal to the extent of his own interest. What do you say to that, Mr. Hart? I confess I cannot get over it. (*Mr. Hart.* There was no change of possession, and Kelly had only the equitable, not the legal estate. There is no lease for a year). *Lord Eldon* (C.) It is stated, in one of the cases, that the mortgage was by lease and release, and we have been proceeding here on the supposition that this was correct.—*Hart.* The cases were prepared on the other side of the water.—*Lord Redesdale.* It is not the practice in Ireland, I believe, to make a lease for a year, as by act of parliament it is provided that a recital of a lease for a year in the Release shall be evidence of the lease.—*Lord Eldon* (C.)

MORTGAGE, PENDING A SUIT, &c.

If land is aliened pending a suit in equity about it, though this will not prejudice the Plaintiff, the alienance ought to be brought before the Court.

In conveyances by lease and release, it seems not to be the practice in Ireland to make a lease for a year; but the recital in the release is evidence of the lease.

Feb. 15, 1816. (after looking at the deed.) This is neither lease
 nor Release, nor any thing like either. It seems to
 be no freehold conveyance at all, but only gives a
 right to the rents and profits till the debt is paid.

MORTGAGEE,
 PENDING A
 SUIT, &c.

Feb. 25, 1816. *Lord Redesdale.* I shall state the circumstances
 Judgment. of this case, as it appears to me they have not been
 exactly understood. The first bill was filed in 1792,
 to establish the will of 1790, and set aside that of
 1791; and, an issue having been directed, a verdict
 was, in 1794, given against the will of 1791; the
 consequence of which was understood to be the
 establishment of the will of 1790, and there was
 an end of all dispute on that subject. Then, the
 will of 1790 being established, the mortgage to
 Kelly was made in September 1795, which mort-
 gage was of an extraordinary nature, as he was only
 to enjoy the rents and profits till he was paid; so
 that the mortgage was made before there was any
 question as to the 40,000*l.* bond. The mortgage
 was registered in September 1795; and the effect of
 the registration is different in Ireland, from what it is
 in England in those instances in which it is used; as
 in Ireland the effect is to give a preference, both in
 law and equity, against all subsequent deeds what-
 ever. The effect then was to give a prior right to
 the mortgagee, as this was an alienation by the de-
 visee prior to the action on the bond. The action
 was brought after the alienation; and by the statute
 of Anne in Ireland, which is the same as the
 statute of William here, the alienation is not af-
 fected by the judgment, but the demand is personal
 against Arthur H. Daly for the value. This seems

Registration
 in Ireland
 gives a prefer-
 ence in law
 and equity
 against all
 subsequent
 deeds.

4 Anne, c. 5.
 3 Gul. Mar.
 c. 14.

totally to have escaped attention. The action on Feb. 25, 1816. the bond was then brought, and the judgment was subject to the mortgage to Kelly. The bond was not in suit till 1797; for the proceedings in the Ecclesiastical Court, annulling the probate taken under the will of 1791, were not completed till 1797. The action being brought, the bill was amended, and prayed an injunction; for Arthur Henry Daly seems to have been advised to make no defence at law against the bond; whether rightly advised or not is another question; but he seems to have been, in point of fact, so advised.

Then the cause came to a hearing in March 1800, and the decree was of this description, that the bond should stand as a security to Michael Daly for the principal sum of 40,000*l.* with interest, from March 14, 1791, the day of the testator's death, instead of from the date in the bond, which, I presume, was founded on evidence that the bond was not intended to operate, unless in the event of no provision being made for Michael Daly by will. I do not see on what other ground it could be. Then an account is directed to be taken of what was due to M. Daly under the bond; and the Master was ordered to set off the amount of such sums as M. Daly had received. In November 1800, the cause was reheard, and the decree was affirmed. Now this decree supposes that the bond was to be relieved against to a certain extent, and is therefore so far correct; for whereas the bill prayed relief against the bond, the decree did relieve to a certain extent, but ordered payment of the bond according to the nature of the relief, and the bill

MORTGAGE,
PENDING A
SUIT, &c.

Bond payable
in 1777.
Obligor dies
in 1791.
Obligee
brings action
on the bond,
and injunction
to stay pro-
ceedings upon

Feb. 25, 1816. must be understood as having, by implication at least, submitted to have the relief made effectual according to the rights of the parties.

**MORTGAGE,
PENDING A
SUIT, &c.**

it. Bond is considered as valid, and decree for payment, but with interest only from the time of the obligor's death. This is correct, as the bond is relieved against to a certain extent, and the bill must be considered as having submitted to have the relief made effectual according to the rights of the parties.

This decree was followed up by an order in the common way, that the estates should be sold, and that all necessary parties should convey. That however did not bind Kelly. The real estates were sold to Gore in trust for M. Daly, and conveyed to him by A. H. Daly: so that Gore took only what A. H. Daly could give, and no more; and that was subject to the mortgage to Kelly.

Then Kelly filed his bill to establish his own mortgage, and charged collusion between the parties to defraud him (Kelly); and that in consequence of such collusion, A. H. Daly had abandoned an appeal from the decree, which he once intended, and that he (Kelly) was in danger of losing the benefit of his security. That bill was against M. Daly, A. H. Daly, and against Gore, and was properly so filed. Afterwards he moved the Court to be allowed to present an appeal in the name of A. H. Daly, in the cause of "*Daly v. Daly*," as the time was almost out. An order was accordingly made under the restrictions therein mentioned, and Kelly was also directed to speed his own cause to a hearing; but instead of that, he let it rest. It was material, however, that he should have speeded his own cause, as the decree in the other cause was still open to review in the Court of Chancery; and this bill was against Gore, who might dispute the validity of the mortgage.

Then the cause came here, and the Lords saw that there was an impeached mortgage, and that

the decree, not being affirmed here, was open ^{Feb. 25, 1816.} to review below, so far as the interest of a third party was concerned. Then an order was made to speed Kelly's cause—(*Lord Eldon, C.* Is any decree in Kelly's cause made up? *Hart.* No. *Lord Eldon, C.* Then we cannot hear any appeal from it.)—and a decree was made in it. This decree proceeds on the idea that the Court could not enforce Kelly's security, in case the decree in "*Daly v. Daly*" should not be impeached here. That however was a mistake; for that decree not being affirmed here, the Court below could still take cognizance of it by review.

MORTGAGEE,
PENDING A
SUIT, &c.

The only way of proceeding therefore is to send this again to Ireland, that the Court below may try the question between Gore and Kelly, and whether Kelly cannot still have satisfaction out of the real estate of the testator Denis Daly. If that can be done, the consequence will be that the appeal in "*Daly v. Daly*" may drop, if Kelly may have a decree against the lands in the hands of Gore, which I think he may; and then A. H. Daly would be personally answerable to the others. We cannot proceed in these appeals as they stand.

Lord Eldon (C.) I concur in this view of the case, which is as I before stated, with the exception of my not having noticed the circumstance of the registration. But even now I cannot see the necessity of giving Kelly liberty to appeal against the decree in "*Daly v. Daly*." If the alienation was prior to the action on the bond, and the statute of Anne in Ireland is the same as the statute of Wil-

Feb. 25, 1816. **liam** here, the consequence is that the estate must answer the value of the incumbrance. As the Court cannot proceed but by sale of the estate, it is necessary to have the alienance before it to convey; and, if there are vexatious alienations pending a suit, the Court will restrain them.

**MORTGAGE,
PENDING A
SUIT, &c.**

If there are
vexatious
alienations
pending a suit,
the Court will
restrain them.

Sir S. Romilly. The estate was devised by the testator Denis Daly, subject to the payment of his debts.

Lord Redesdale. That is a new question. If the testator devised the lands charged with payment of his debts, that puts an end to Kelly's security, unless he can impeach the bond.

Sir S. Romilly. It was not thought material to press that point, until the view now taken of the case by Lord Redesdale.

**Formal Order,
May 21, 1816.**

The formal order of the House, after the common recitals, with the addition that, as the decree of 1813 had not been made up, the Lords could not hear an appeal from it; and that the minutes would only have warranted a decree establishing the right of Kelly to the benefit of the mortgage against A. H. Daly, and not against the other parties claiming the property comprised in the mortgage, by force of the decree of March 7, 1800, proceeded thus:—
 “ *It is ordered, &c.* that the said cause, in which
 “ the said Thomas Kelly is Plaintiff, and the said
 “ Arthur Henry Daly and others are Defendants,
 “ be referred back to the said Court of Chancery in
 “ Ireland, and that the said Thomas Kelly do apply
 “ to the said Court for leave to re-hear the said cause

“ and to bring before the said Court on such re-May 31, 1816.
 “ hearing, or in such other manner as to the said
 “ Court shall seem fit, all proper parties for the ^{MORTGAGE,}
 “ purpose of enabling the said Court to decide whe- ^{PENDING A}
 “ ther the said Thomas Kelly is entitled to the be- ^{SUIT, &c.}
 “ nefit of the said indenture of mortgage, of the
 “ 14th day of Sept. 1795, against the several per-
 “ sons claiming the benefit of the said decree of the
 “ 7th day of March, 1800, notwithstanding such
 “ decree remains in force against the said Arthur
 “ Henry Daly; and whether the said Thomas
 “ Kelly has a right to impeach the said decree of
 “ the 7th March, 1800, being no party thereto, to
 “ the extent of his claims under the said indenture
 “ of mortgage, either by bill in the nature of a
 “ bill of review, or otherwise. And it is further or-
 “ dered, that the said appeal in the name of the
 “ said Arthur Henry Daly in the first-mentioned
 “ cause, and the appeal against the order made
 “ in that cause, and in the said cause of Kelly
 “ against Daly, for liberty to present such first
 “ appeal, do stand over until the further order of
 “ their Lordships.”

Agents for Appellant. HANROTT and METCALFE.
 Agent for Respondents, KEANE.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

ROSSE (Earl of)—*Appellant*.STERLING (Rev. James) and others—*Respondents*.

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT,
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

BILL in 1805 for performance of an agreement made in 1761, for sale of lands, and decreed accordingly below; but the decree reversed in Dom. Proc., Defendant having been left in possession as owner for a long time, and Plaintiff having done acts inconsistent with the notion of his being owner himself, which was considered as amounting to a waiver.

Objection to a decree made in 1812, that it ordered payment of a sum found due, and directed to be paid with interest by a decree made in 1766, on the foot of accounts settled in 1756 and 1761, between attorney and client, in which the attorney charged interest upon interest, with interest on the consolidated sum from 1766 to 1812. That sum acknowledged by the objecting party, by solemn deed in 1783, to be due with interest, and the objection comes too late; though, if objections had been recently made for the purpose of opening the accounts, they could hardly have failed of being effectual.

Father, tenant for life, borrows money, to secure which he, and his son, remainder-man in fee, join in a mortgage of the inheritance. The son is entitled in equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of it for the son's relief, &c. &c.

Marriage settlement, 1730.

BY a settlement, dated, September 4, 1730, made on the marriage of Lawrence Parsons, grandson and heir apparent of Sir William Parsons, of Par-

sonstown, in the King's County, and Mary Sprigge, ^{May 17, 20,}
 eldest daughter of William Sprigge, of Clonivoe, ^{22, 24;}
 in the King's County; after reciting that the Par- ^{June 24, 29,}
 sons' estate was subject to certain incumbrances, ^{1816.}
 and amongst others to a mortgage created in 1707, ^{AGREEMENT.}
 described as *Upton's* mortgage, the Parsons' estate ^{—SPEC. PER.}
 in the King's County was settled on Lawrence Par- ^{—WAIVER.—}
 sons for life, remainder to his first and other sons in ^{ACCOUNT.—}
^{INTEREST.—}
^{MORTGAGE,}
^{&c.}

tail male, with power to charge the estate with 400*l.* per annum for any future wife, and with 4000*l.* for the younger children of any future marriage, in case he should have no younger children by Mary Sprigge: and by the same settlement, William Sprigge covenanted to stand seised of an undivided moiety of Clonivoe, Clonad, and other lands, of which he had the reversion in fee expectant on his own death without issue male, and possessed of an undivided moiety of certain leasehold estates, to the use of Lawrence Parsons and Mary Sprigge, and the survivor of them, for life; remainder to their first and other sons in tail male; remainder to Mary Sprigge, her heirs and assigns, reserving a power to himself to charge the undivided moiety of the lands with 2000*l.*

The marriage took effect. Mary Sprigge died in 1731, leaving William, the father of the Appellant, her only child; and William Sprigge died in 1735 without issue male, leaving William Parsons the son of his daughter Mary, and his daughter Margaret married to Thomas Burgh, his co-heirs at law, having executed his power in favour of his daughter Margaret.

In 1742, Burgh and his wife filed a bill for

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22, 24;
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raising this 2000*l.* out of the Parsons' moiety of the Sprigge estate, and obtained a decree; and in 1746, the sum was paid by Lord Loftus upon the security of an assignment of the decree. In 1742, also, Sir Lawrence Parsons married again; and, under the power reserved in his first marriage settlement, he charged the Parsons' estate with 400*l.* per annum as a jointure for his second wife, and 4000*l.* for the younger children. There were issue of this marriage two sons; but the whole charge of 4000*l.* became vested in Anne Parsons, the daughter of one of them, and wife of Richard Blake Deverall. Of this sum of 4000*l.*, a sum of 3275*l.* was afterwards paid by the Earl of Rosse, subsequent to his father's death.

In 1754, Sir Lawrence Parsons, and William his son, suffered a recovery of the Parsons' and Sprigge estates, the uses of which were, subject to Loftus's charge, and Upton's mortgage, to Sir Lawrence for life, remainder to his son William and his heirs.

1754.

Marriage of
Sir W. Par-
sons to Mary
Cleare. Mar-
riage articles.

In the same year 1754, on the intermarriage of William Parsons with Mary Cleare, only child of John Cleare, of Kilbury, in the county of Tipperary, marriage articles were executed, by which it was agreed that all the estates included in the settlement of 1730, except those of Clonivoe and Clonad, should be conveyed to trustees for a term of 200 years, with remainders to Sir Lawrence and William for life; remainder, subject to a jointure to Mary Cleare, and a provision for younger children, to the first and other sons of the marriage in tail male. And it was agreed that, as soon as Mary Cleare should come of age, her estates should be

settled to the like uses. And the trusts of the 200 years' term as to the Parsons' estate were declared to be, that the trustees should, at the request of Sir Lawrence Parsons, raise thereout, by sale, mortgage, or demise, a sum not exceeding 12,000*l.*, to be applied in paying off all incumbrances affecting the said Parsons' estate, except jointures, and the residue to be applied as Sir Lawrence Parsons should direct. The trusts of the term of 200 years created of the Cleare estates were declared to be to pay the debts of John Cleare. These articles were prepared and witnessed by Marlborough Sterling, agent and attorney for Sir Lawrence and Sir William Parsons.

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT.
—SPEC. PER.
—WAIVER—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

Trust term.

Sir Lawrence Parsons died in October 1756, leaving his son William, his only issue by his first marriage; and in December 1756, an account was settled between Sir William Parsons and Marlborough Sterling, and in this account Sir William was made debtor in a sum of 3899*l.* of which 2500*l.* were the debts of Sir Lawrence. This latter sum was made up of two judgments, obtained by one Moore against Sir Lawrence Parsons in 1730, and assigned to Marlborough Sterling in 1751, and of a bond given by Sir Lawrence to Sterling in 1753, with interest upon these sums. The same day on which the account was settled, Sir William Parsons executed to Sterling a mortgage in fee of the lands of Clonivoe and Clonad, which were not included in his marriage settlement, for securing the payment of this sum of 3899*l.* the interest being thus made principal.

Account
stated 1756.

And mortgage
for the ba-
lance.

In 1758 a private act of parliament was obtained

1758.
Private act of

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT.

—SPEC. PER.

—WAIVER.

ACCOUNT.—

INTEREST.—

MORTGAGE,

&c.

parliament for
raising

12,000*l.* out

of the Par-

sons' estate,

and 6000*l.* out

of the Cleare

estate.

to raise the 12,000*l.* agreed to be raised at the request of Sir Lawrence Parsons, a doubt being entertained whether it could be raised otherwise, Sir Lawrence Parsons having done nothing to signify his request or consent. By this act—reciting the articles of 1754, &c. and that 8000*l.* of the 12,000*l.* was, then and at the time of the execution of the said articles, a charge on the estates of Sir William by old mortgages; and that 4000*l.* was due from Sir Lawrence by judgments which would be lost to his judgment creditors unless the 4000*l.* should be raised: also reciting that the debts of John Cleare amounted to 7000*l.*; and that Sir William Parsons, not having received any ready money with his wife, Mary Cleare, had contracted debts to the amount of 6000*l.*; and that Mary Cleare, or Parsons, was desirous to raise, by sale of a competent part of her estates, 6000*l.* to pay Sir William's debts; and that Sir William was seized in fee of an undivided moiety of certain lands in the King's County which he was desirous to settle to the uses of the marriage articles of 1754 as a compensation to his wife Mary Cleare for such part of her estates as should be sold for the payment of his debts—it was enacted that the Cleare and Parsons' estates should be vested in trustees for the purposes stated in the recitals; and, subject to such purposes, they were limited to the same uses as declared by the articles of 1754. The lands which formed the subject of compensation, as above-mentioned, were part of those which had been previously mortgaged to Sterling. There were several sons of this last marriage, of whom the Earl of Rosse was the eldest.

In March 1761, an agreement was entered into ^{May 17, 20,} between Sir William Parsons and Marlborough ^{22, 24;} Sterling, for the sale to the latter of the lands of ^{June 24, 29,} Clonivoe and Clonad, reciting the settlement of ^{1816.} 1730 and the other family transactions mentioned; ^{AGREEMENT.} and that Sir W. Parsons was seized in fee of these ^{—SPEC. PER.} lands, they not having been included in the articles ^{—WAIVER.} of 1754, nor in the private act of parliament; that ^{ACCOUNT.—} Lord Loftus had filed a bill in 1759, praying that ^{INTEREST.—} the 12,000*l.* might be raised, and the sum due on ^{MORTGAGE,} his security paid thereout, or that the lands of ^{&c.} Clonivoe and Clonad might be sold for that purpose: and also reciting that Sir W. Parsons was indebted to Sterling in several sums of money due on judgments and otherwise, &c., and that Sterling had agreed to purchase the lands, in discharge of the whole or some of the judgments, at the price of 3934*l.*, being at the rate of twenty-three years' purchase, allowing 900*l.* for the casual rise of the rents on the expiration of the leases; and further reciting that it was uncertain whether the lands in question were not chargeable with the debt of Lord Loftus; equally and rateably with the lands of which Sir W. Parsons was tenant for life, until a decree should be made in the said cause, it was witnessed that Sir W. Parsons agreed to convey the lands to Sterling, or any person whom he should appoint, within a reasonable time after such decree obtained. And Sterling agreed to discharge such of the judgments as he, his heirs, &c. should think proper or convenient, amounting to the sum of 3934*l.*, the purchase money of the said lands, provided that, in case the lands should be found chargeable with any

Agreement in
March 1761,
for sale to
Sterling of the
Clonivoe, &c.
estates.

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT.

—SPEC. PER.

—WAIVER.

ACCOUNT.—

INTEREST.—

MORTGAGE,

&c.

Sterling agrees
to accept the
rents in lieu of
interest.

part of Loftus's debt, Sterling, &c. should be at liberty, at his or their election, to pay the sum charged upon the lands, and should be allowed the same as part payment of the 3934*l.*; or, in case they did not choose to advance the money, and it should be raised out of the lands, that Sterling should be allowed to deduct the same out of the purchase money: and Sterling, in consideration of an assignment of the rents and profits of the lands from March 25, then instant, agreed that the interest on the judgments making up the purchase money should cease from that time, Sterling having agreed to accept the rents in lieu of interest. And it was agreed that, in case the agreement should not be carried into effect, nothing contained in it should affect or invalidate the mortgage of the lands before executed to Sterling.

In July 1761, a sale was made of part of Lady Parsons' estate under the act of parliament, and a sum of 1385*l.* was paid by the trustees to Sterling.

August, 1761.
Another account stated.

On August 14, 1761, a general account was stated between Sir W. Parsons and Sterling, including, besides the incumbrances, several simple contract debts due from Parsons to Sterling, which were afterwards discharged and form no part of the present question; and a balance of 1915*l.* was stated to be due to Sterling; and this account was signed by Parsons and Sterling, acknowledging that it was correct.

1764. Bill filed
by Sir W.
Parsons.

In 1764, Sir W. Parsons filed a bill against Lucy Sterling, the representative of M. Sterling, impeaching the accounts of 1756 and 1761, and praying that they might be opened; and that Parsons might

be relieved from the agreement of March 1761, for sale of the lands of Clonivoe and Clonad. Lucy answered, stating that she was willing to settle accounts on the footing of the accounts of 1756 and 1761, and to waive the agreement for a sale, on payment of what should appear due. By decree July 8, 1765, it was referred to the Master to settle an account on the ground of the mortgage of 1756, and the account of August 1761. In Feb. 1766 the Master made his report, finding that the sum of 8857*l.* was due to the representative of M. Sterling, in which was included a sum of 1512*l.*, alleged to be due on account of two judgments passed by Sterling to a person of the name of Neynoe, as a farther security for debts of Sir L. and W. Parsons; though this latter sum was afterwards admitted to be, for the greater part, an overcharge.

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.
Answer.
Decree, 1765.

Neynoe's
judgments.

On Feb. 28, 1766, a decree was made in the cause, that Plaintiff do, in six months, pay to Defendants the said sum of 8857*l.* with interest from Feb. 26, 1766, the time of confirming the report; and that thereupon the sale agreed to be made should be set aside, and that the Defendant should re-convey the lands; and that in default of payment of principal and interest within the time limited, the sale should stand absolutely confirmed, and that an injunction should issue to put Lucy Sterling in possession &c.; and that either Plaintiff or Defendant might make up a decree for performance. In this decree no provision was made, in the event of the sale being carried into effect, for the payment

Decree, 1766.

May 17, 30, of the residue of the debt, above the sum for which
22, 24 ; the lands were to have been sold.
June 24, 29,
1816.

AGREEMENT.

—SPEC. PER.

—WAIVER.—

ACCOUNT.—

INTEREST.—

MORTGAGE,

&c.

1779. Reco-
very.

In 1779, Sir W. Parsons and his eldest son, the Earl of Rosse, suffered a recovery of the lands comprised in the articles of 1754, and the act of 1758, except the small part of the Cleare estate sold in 1761, the uses of which, subject to Upton's mortgage and Lord Loftus's demand, were declared to be such as Sir W. and his son should appoint, and in default of appointment to Sir William for life, remainder to the Earl of Rosse in fee. No steps were taken by the representatives of M. Sterling to enforce the decree of 1766 for a sale of the lands of Clonivoe and Clonad, of which Sir W. Parsons was left in possession during the remainder of his life, a period of twenty-five years.

1783.
Browne's
mortgage.

In 1783, Sir William Parsons having occasion to borrow certain sums, amounting in all to 15,000*l.*, was joined by the Earl of Rosse in a mortgage of the settled estates to one Browne, who advanced the money; and at the same time Sir W. Parsons and his son, and Lucy Sterling, executed a deed, reciting the decree of 1766, and that the sum of 8857*l.* was due under that decree to Lucy Sterling, together with a large arrear of interest; reciting also Browne's mortgage, and that, in order to protect the mortgage, it was necessary that three of the old judgments vested in Lucy should be assigned in trust for Browne, and that two more of them should be satisfied, and that 2500*l.*, part of the money borrowed from Browne, had been paid to Lucy Sterling, in part and on account of interest.

1783. Release.

due to her on foot of the said sum of 8857*l.* so decreed to her, and that Lucy had agreed to assign and satisfy these judgments as aforesaid: and Sir W. Parsons and the Appellant thereby agreed that this transaction should be without prejudice to the demands under the decree, and the other demands of Lucy Sterling against Sir W. Parsons and his father, or to any securities that remained for the same, but that they should be in full force, deducting the said 2500*l.* which Lucy acknowledged to have received in part and on account of interest due to her on foot of the 8857*l.* and released and discharged the same accordingly.

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT.
—SPEC. PER.
—WAIVER—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

Sir W. Parsons borrowed a further sum of 2000*l.* from Browne, on assignment of Upton's mortgage; and Lord Loftus's charge of 2000*l.* was assigned, in 1803, to Sir G. Pigott. Sir William Parsons died in May 1791, leaving the Earl of Rosse his eldest son and heir at law, having made and published a will, dated August, 1761, devising all his estate and lands in the county of Wexford, which descended to him as heir at law, to his uncle Piggott Parsons St. George, to trustees, to sell the whole or a competent part of the same to discharge his judgment debts; and devised to his right heirs such part of the estate and lands as should remain unsold; and bequeathed his personal property to such younger children as he should have at the time of his decease, and in case he should have none, to his wife Mary Parsons; and appointed his wife and the Rev. Richard Chalkoner, executors.

1791. Death
of Sir W. Par-
sons.
Will of Sir W.
Parsons.

From the time of his father's death the Appellant paid the interest of the 15,000*l.* borrowed from

Payment by
the Appellant.

May 17, 20,
22, 24 ;
June 24, 29,
1816.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

Browne, together with an arrear of interest due thereon at that time. He also, since his father's death, paid various sums for interest on Loftus's or Piggott's mortgage, and Upton's mortgage, and for younger children's portions created under the settlement of 1730, and a sum due from his father at his death to a creditor of Lucy Sterling ; and in 1796 sold the lands of Clonad, and applied the purchase money in these payments.

1805. Bill by
Sterling's re-
presentatives.

In September 1805, the Respondents, as representatives of Marlborough Sterling, filed their bill against the Earl of Rosse and others, admitting an overcharge in the report of 1766, with respect to Neynoe's judgments, and offering to give credit for it, and praying an account on foot of the decree of 1766, and offering to waive the agreement of 1761 for the sale of the lands of Clonivoe, &c. on being paid what should appear due to them on that account ; otherwise that the sale might stand, and the purchase money be applied to disencumber the lands so agreed to be sold : and in that case the bill prayed an account on the foot of the mortgage of 1756, and a foreclosure ; and that the balance, if any, should be decreed a lien on the trusts of the act of parliament for raising the 12,000*l.*, and 6000*l.* ; and in case it should appear that these sums had been fairly applied, and that sufficient did not remain to satisfy the demands, then that the Wexford estates might be sold for payment of the Plaintiffs and other judgment creditors of Sir W. Parsons, &c. This appears to have been the prayer generally, though the printed cases did not, in several material particulars, correspond to the original pleadings ;

and there was some dispute at the bar as to whether the bill was to be considered as a bill for specific performance, or a bill of foreclosure. The Earl of Rosse, in his answer, stated several objections to the securities; that M. Sterling was the attorney as well as agent and receiver of Sir L. and Sir W. Parsons, and in the accounts settled charged interest on interest; that the judgments assigned to M. Sterling were stale demands, and that it was very unlikely he should have paid full consideration, &c.

May 17, 20,
22, 24;
June 24, 29,
1816.
AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.
ANSWER.

By decree, Feb. 5, 1810, it was referred to the Master to take an account of what was due on foot of the sum specified in the decree of 1766, deducting the overcharge on account of Neynoe's judgments, and to take other accounts arising out of the above-mentioned circumstances. The Master made his report, finding 17,000*l.* due to the Respondents; which, together with a sum for interest from 1810 to 1812 not calculated by the Master, made up 18,744*l.* in the whole.

Decree, 1810.

On Nov. 17, 1812, the Court decreed the Respondents entitled to the sum of 18,744*l.* with interest from the time of confirming the report, and that, unless the Appellant should pay the same in six months, the Respondents should be, and were thereby declared to be, entitled to have the agreement of 1761 for sale of the lands of Clonivoe, &c. carried into specific execution; and the Appellant was ordered to convey accordingly; and the Master was directed to ascertain the purchase money to be paid for the lands under the agreement of 1761, &c., and to take an account of the rents and profits from that period, and of the purchase money and interest

Decree, 1812.

May 17, 20,
22, 24 ;
June 24, 29,
1816.

AGREEMENT.
—SPEC. PER.
—WAIVER—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

thereof of certain parts of the lands sold by the Appellant; and it was ordered that the Master should ascertain the sum due to the Respondents, and that the same should be a charge on the Wexford estates, and the rents thereof received by the Appellant, and on the sums of 12,000*l.* and 6000*l.* mentioned in the private act of parliament, so far as these sums might be applicable to the payment of the Respondent's demands, and that in default of payment sales should be made accordingly, &c.

Appeal.

From this decree the Earl of Rossie appealed.

The grounds of the principal objections made to the decree were, that the agreement which it directed to be carried into specific execution had been waived; that by directing payment with interest of the sum specified in the decree of 1766, interest was charged on interest, which was allowable only in case of a mortgage; and the cases of *Creuse v. Hunter*, 2 Ves. 157, 4 Bro. Ch. Ca. 316, and *Tew v. Lord Winterton*, 1 Ves. 451, where interest was refused on arrears of annuities, were cited. (*Lord Redesdale.* The decree of 1766, directs the payment of the sum found due, with interest; that decree is not appealed from, and the question is not open to you except in this way, that, as this is a bill to carry into execution a decree, that decree may be impeached for impropriety.) That was stated to be the ground taken; and the proposition was that interest was to be calculated as if no decree had been made in 1766, and the cause had still remained in Court. The decree could not, as a decree, affect the real assets of Sir W. Parsons descended or devised. The Respondents could affect them only

by resorting to their securities, and could only have an account of the sums due upon them with simple interest, subject to the inquiries and directions which the securities and alleged settled accounts between attorney and client called for. Another objection made to the decree was, the charging the Appellant with bye-gone rents of the estates descended and devised, which he had applied in payment of other judgment and mortgage creditors of Sir W. Parsons, and most part of them before the filing of the Respondent's bill; and it was objected also that no provision had been made by the decree for the payment of Browne's mortgage as far as possible out of the assets of Sir W. Parsons, the fund primarily liable to pay it.

May 17, 20,
22, 24;
June 24, 29,
1816.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
MORTGAGE,
&c.

Sir S. Romilly and *Mr. Wetherel* for the Appellant; *Mr. Leach* and *Mr. Nolan* for the Respondents.

Lord Eldon (C.) This case itself is a difficult one on account of the variety of transactions at different periods which it involves; and the difficulty is increased by the difference between the case as it appears in the prints, and the same case as stated in the pleadings, a difference now known to be very material. This circumstance I hope will not occur again, as it is impossible that this House can, consistently with the due discharge of its judicial and other functions, take the trouble of minutely examining all the papers in the cause which are not in print, in order to know what the case really is.

The principal question is, whether the contract Agreement.

May 24, 1816. of 1761 ought to be specifically performed, more than half a century after it was made. There was a mortgage in 1756, which comprehended these estates in the contract in 1761.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
MORTGAGE,
&c.

Practice.

It appears by the bill of 1764 that it was filed partly for the purpose of impeaching the contract of 1761, and a decree was made upon this bill for payment, by the Plaintiff, of the sum of 8,857*l.*, or otherwise that the sale should stand confirmed. And I mention that now, as this practice which they seem to act upon in Ireland, where a bill is filed for the purpose of impeaching a contract, of pronouncing a decree upon it, not dismissing the bill, because there are no grounds for impeaching the contract, but ordering the contract to be carried into execution, is a species of proceeding very much unknown to us, &c.

[It is unnecessary to state the remaining observations made this day, as they were in substance the same as those made on a subsequent day, as under.]

Judgment.
June 24, 1816.
Objections to
the account,
&c. of 1756.

Lord Eldon, C. (After stating the preceding part of the case, and particularly adverting to the account of 1756.) It has been very truly remarked, that Sir W. Parsons was, within a month after his father's death, made debtor in this account in a sum of 3,899*l.* of which 2,535*l.* consisted of the debts of his father Sir Lawrence, who was strict tenant for life; and that M. Sterling, on the same day, obtained a mortgage from Sir W. Parsons of the lands of Clonivoc and Clonad for securing the said sum, of which a considerable part consisted of interest, which was thus made principal. I take notice

of these circumstances that it may be seen that June 24, 1816.
 they have not escaped my attention; but, though
 this transaction in 1756 was one against which a AGREEMENT.
 —SPEC. PER.
 —WAIVER.—
 ACCOUNT.—
 INTEREST.—
 MORTGAGE,
 &c.
 great deal might be urged if challenged at the
 time, yet, after what has passed, the representatives
 of M. Sterling must be held to be creditors for a
 considerable sum of money.

Come too late.

Articles, 1754.

By articles made in 1754, on the marriage of Sir
 W. Parsons with Mary Cleare, a sum of 12,000*l.*
 was to be raised out of the Parsons' estates, at the
 request of his father, Sir L. Parsons, for paying off
 incumbrances on these estates; and a private act Act of parli-
 ament.
 of parliament was obtained, in 1758, by Sir W.
 Parsons, reciting the articles and the death of Sir
 Lawrence without having done any thing to signify
 his request, &c. and reciting also that 8000*l.*, part
 of the said 12,000*l.*, was then, and at the time of
 the execution of the articles, a charge on the estate
 of Sir W. Parsons by old mortgages; and that the
 remaining sum of 4000*l.* was due from Sir L.
 Parsons by judgments, which would be lost to the
 judgment creditors, unless that sum should be
 raised; and reciting that Dame Mary Parsons was
 desirous to raise a sum, not exceeding 6000*l.*, to pay
 the debts of Sir W. Parsons, and that Sir W. Par-
 sons was seized in fee of certain lands therein men-
 tioned, which he was desirous to settle to the uses
 of the articles of 1754; and then enacting that the
 Cleare estate should be vested in trustees to raise
 the 6000*l.*, to be applied in payment of debts upon
 any securities in writing given by Sir W. Parsons
 before January 1, 1757; and that the Parsons'
 estates should be vested in the same trustees to

June 24, 1816. raise the 12,000*l.* to be applied in payment of incumbrances affecting these estates on June 28, 1754, and then in payment of judgment debts of Sir L. Parsons.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

Agreement,
1761.

The next transaction was an agreement, in March 1761, between Sir W. Parsons and M. Sterling, for sale to the latter of the lands of Clonivoe and Clonad, upon which, it will be remembered, M. Sterling had obtained a mortgage to secure the balance of the account settled in 1756; thus, as to some of the items, converting interest into principal. This agreement recited the settlement of 1730, and subsequent family settlements; that Sir W. Parsons was seized in fee of the lands of Clonivoe and Clonad, which were not included in the articles of 1754, nor in the private act of parliament; that Lord Loftus had filed a bill in Chancery to have his mortgage money paid, praying that the 12,000*l.* might be raised, or that the lands of Clonivoe and Clonad might be sold for that purpose; that Sir W. Parsons was indebted to M. Sterling by several judgments, and was desirous to pay off so much thereof as the purchase money of Clonivoe and Clonad would cover; and that M. Sterling had agreed to purchase these lands for a sum of 3,934*l.*, being at the rate of 23 years' purchase for the then rents, allowing 900*l.* for the casual rise of rents on the expiration of the leases, &c.: and then the instrument went on to witness that Sir W. Parsons had agreed to sell the lands of Sterling, and that Sterling agreed to release such of the judgments as he might think proper to the amount of the purchase money, and that, in case the lands were subject to Lord

Loftus's mortgage, Sterling should be allowed still ^{June 24, 1816.} to retain undischarged so much' of the judgment debts, otherwise to be released, as would pay that mortgage: and then came a clause deserving particular attention, by which M. Sterling, in consideration of the grant and assignment of the rents and profits of the premises from and after March 25, 1761, agreed that all interest on so much of the judgments as should amount to the purchase money should, from that day, cease and determine; it being the agreement of the parties that, though the interest should exceed the rents and profits, Sterling had, in consideration of the rise in value of the lands on the expiration of the leases, consented to accept the profits of the lands in lieu of the interest: and regard ought to have been had to that particular stipulation. And then there was a clause that, in case the agreement for the purchase of the lands should not take effect, nothing therein contained should affect or invalidate the mortgage. This deed was never registered.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

In July 1761, a sale was made of part of Lady Parsons' estate by the trustees under the act of parliament, and a sum of 1,385*l.* paid to Sterling in part discharge of his demands against Sir W. Parsons: and on August 14, 1761, a general account was stated by Sterling on the foot of the incumbrances, and also on foot of some simple contract, demands and costs which appear to have been discharged, and therefore it is unnecessary farther to notice them. Objections were stated to several items of this account, which, if made at an early period after the transaction, for the purpose of

Account,
Aug. 1761.

Objections to
this account
come too late.

June 24, 1816.

AGREEMENT.

—SPEC. PER.

—WAIVER.

ACCOUNT.—

INTEREST.—

MORTGAGE,

&c.

1764. Bill by
Sir W. Par-
sons to open
the accounts,
&c.

opening the whole account, would have considerable weight. But these objections come too late in a suit instituted after the year 1800, though, if recently made, they could hardly have failed of being effectual.

In 1764, Sir W. Parsons filed a bill against Lucy Sterling, widow and administratrix of M. Sterling (who had died in 1762), and against his two daughters, who were his only issue, praying that the accounts of 1756 and 1761 might be opened, and an account taken on the foot of the original securities, and likewise praying to be relieved from the agreement of sale of the lands of Clonivoe and Clonad. This being a bill for opening the accounts, if Sir W. Parsons did not then obtain the relief prayed for on the grounds then stated, it is impossible that in a fresh suit he should on the same grounds have the relief which he failed to obtain in the former suit. Lucy Sterling answered that she

Answer.

Decree, 1765.

was willing to account on the footing of the settled accounts, and agreed to waive the sale on being paid what remained due to her. By decree, in July 1765, it was referred to the Master to take an account on the foot of the mortgage of 1756, and the stated account of 1761. The Master having made

Decree, Feb.
28, 1766.

his report, a decree was pronounced on February 28, 1766, which, though it is such as I cannot understand, has not been disturbed since that time. The decree was, that “the Plaintiff do in six months “pay to the defendant, Lucy Sterling, the sum of “8,857*l.* 8*s.* 4*d.* with interest from February 26, “1766, the time of confirming the report, and “that thereupon the sale made of the lands of

" Clonivoe and other lands agreed to be sold be, ^{June 24, 1816.}
 " and the same is hereby, set aside, and that Lucy
 " Sterling should re-convey the lands so agreed to ^{AGREEMENT.}
 " be sold." So far the decree is quite intelligible, ^{—SPEC. PER.}
 the other party having agreed to waive the purchase ^{—WAIVER.—}
 on being paid the money due on foot of the mort- ^{ACCOUNT.—}
 gage of 1756, and settled account of 1761, and ^{INTEREST.—}
 the Court having found that, on these grounds, a ^{MORTGAGE,}
 sum of 8,857*l.* was due. But there was another ^{&c.}
 alternative, that the Plaintiff might not pay the
 money; and then, I think, it would not have been
 difficult to frame a proper decree, regard being had
 to all that had passed. But all that the decree does
 is this—that in default of the Plaintiff paying the
 money within the time aforesaid the sale should
 stand absolutely confirmed, and that an injunction
 should issue to put Lucy Sterling in possession of
 the lands, and that either Plaintiff or Defendant
 might make up and enroll a decree for performance.
 If there was no objection to such a decree on such
 a bill, the land could be conveyed only in considera-
 tion of part of the debt, suppose 4000*l.*, and the
 debt was, 8,857*l.*; and the decree did not provide for
 payment of the residue of the debt. It was then
 stated that this sum of 8,857*l.* included, on account
 of Neynoe's judgments, a larger sum than was ac-
 tually due.

No further steps were taken by the representa-
 tives of M. Sterling; and Sir William Parsons, who
 had been decreed to pay the money in six months,
 or otherwise that the sale should stand confirmed,
 continued in possession of the lands during his whole
 subsequent life, being a period of twenty-five years,

June 24, 1816. receiving the rents and profits during all that time.

AGREEMENT.

—SPEC. PER.

—WAIVER.—

ACCOUNT.—

INTEREST.—

MORTGAGE,

&c.

The agree-
ment of 1761
waived.

Release. July
15, 1783.

But in 1783 an instrument was executed which, even if the possession for so long a period should not be considered as a waiver of the sale notwithstanding the decree, appears to me, and the matter is viewed by a noble Lord (Redesdale) near me in the same light, to amount to a waiver of the agreement.

I allude to the deed of July 15, 1783, twenty-two years after the agreement, and seventeen years after the decree, between Sir W. Parsons and the Appellant, and Lucy Sterling. This deed recites the judgments vested in Lucy Sterling, and the decree of 1766, and that the principal sum of 8,857*l.*, with a large arrear of interest, was due to Lucy on the foot of that decree; and that Robert Browne had agreed to lend Sir W. Parsons a sum of 9000*l.* on mortgage of the Parsonstown estates (in which Sir W. had been joined by the Appellant), but required that certain old judgments which partly made up the said sum of 8,857*l.* should be satisfied or assigned to his trustee to protect his mortgage; and that 2,500*l.*, part of the said 9000*l.*, had been that day paid to Lucy on account of interest; and that Lucy had agreed to assign to Browne's trustee three of the judgments, and to satisfy two more of them: and it is by this deed covenanted and agreed between Sir W. Parsons and the Appellant, and Lucy Sterling, that such assignments made, and satisfactions acknowledged, should not prejudice the demands of Lucy under the decree, after deducting the 2,500*l.* out of the arrear of interest, but that the decree and all her securities should continue in full force; and Lucy thereby acknowledged the receipt of the

2,500*l.* on account of interest of the sum due under the decree, and discharged the same accordingly. June 24, 1816.

This instrument is important in several views. It must be taken as an acknowledgment, seventeen years after the decree, that the sum of 8,857*l.* was due, and whatever might have been the effect of the objections to the accounts if recently made, these accounts cannot now be opened up on these objections. There is also another important inference to be drawn from it as to the purchase of the lands of Clonivoe and Clonad; for if the representatives of M. Sterling meant to insist that they were owners of the lands it was impossible that in 1783 they could have considered the interest as due on the sum of 8,857*l.*; for they must have said "We became owners of the lands after default of payment in 1766, and account to us, not for interest on the sum of 8,857*l.*, but for the rents and profits of the lands which we must take according to the agreement in lieu of interest of the judgments which made up the purchase money;" and then the 2,500*l.* would have been taken in discharge on that principle. Besides, therefore, the long possession by Sir W. Parsons, the agreement must, by this transaction also, be considered as waived. Another circumstance to be attended to is, that the assignments and satisfaction should not prejudice the judgments as securities. That is material in this view. Sir William Parsons had occasion to raise 9000*l.* by mortgage, and in the deed of mortgage there was a clause enabling him to borrow more in the same way. He was then tenant for life, with remainder to the Appellant in tail or in fee. This sum of

AGREEMENT.

—SPEC. PER.

—WAIVER.

ACCOUNT.—

INTEREST.—

MORTGAGE,

&c.

Effect of the

release, July

15, 1783.

June 24, 1816. 9000*l.* was borrowed for the tenant for life; and the

AGREEMENT.

—SPEC. PER.

—ACCOUNT.

INTEREST.—

MORTGAGE,

&c.

consequence generally in equity would be that the son, joining in a mortgage of the inheritance, would be considered as a creditor on the real and personal assets of the father to the amount of the mortgage, and might call upon the mortgagee to make use of it against the real and personal assets of his father to work out his relief: and in general cases Browne would have been bound to make the most of it against the assets of Sir W. Parsons, so as to relieve the Earl of Rosse as far as he could. But then it was agreed that the Earl of Rosse should not make use of that equity as to the 2,500*l.*, to the prejudice of the Sterlings.

1805. Bill by
the Sterlings.

In 1805 the Respondents, as representatives of M. Sterling, filed their bill, admitting an overcharge in 1766 on Neynoe's judgments, of which overcharge the amount was therefore to be deducted, and praying an account on foot of the decree of 1766, and offering to waive the agreement of sale on being paid what should be found due to them, otherwise that the sale might stand confirmed, &c. &c.

Now, without going through the detail of these pleadings, of which much is printed, and much ought to have been which has not been printed, the first question is whether the decree is right in considering the agreement of 1761 as binding at this day, so as to form a ground for enforcing a sale and purchase. The decree has so considered it, and after all the attention that I have been able to bestow on the case I cannot advise your Lordships to hold that this is right: and if it is wrong that will produce a very considerable variation in the

Decree of 1812
erroneous in
considering
the agreement
of 1761 as
binding.

decree. Another circumstance to be attended to is ^{June 24, 1816.} this. The money raised on Browne's mortgage, in which the Appellant joined, was the proper debt of Sir W. Parsons, and should be paid out of his assets; and the consequence is that the Earl of Rosse may be entitled to rank as a creditor generally on his father's assets for this sum, and to stand in the place of persons whose debts he paid, in competition with the Sterlings. By the industry of the noble Lord (Redesdale) who sits near me, a judgment applicable to the case will probably soon be prepared.

AGREEMENT.
—SPEC. PER.
—WAIVER.—
ACCOUNT.—
INTEREST.—
MORTGAGE,
&c.

Ordered and adjudged: " That the decree of 27th Nov. ^{June 29, 1816.} 1812 be reversed. And it is declared that the contract contained in the deed of 17th March, 1761, for sale of the lands therein described, ought to be considered as having been abandoned, and ought not now to be carried into execution. And it is therefore ordered, That the Respondents' bill, so far as the same seeks a performance of such contract, be dismissed; and it is further declared that the lands comprised in such contract are to be considered as real assets of Sir William Parsons, Bart., deceased, the father of the Appellant, descended to the Appellant, discharged from such contract, but subject to the mortgage made thereof, with other lands, by the said Sir William to Marlborough Sterling deceased, in the pleadings in this cause named, and to the debts by judgment affecting the same, and to the charge for payment of judgment debts created by the will of the said Sir William. And it is further declared that so much of the sum of 8,859*l.* 13*s.* 1*d.* mentioned in the decree of 26th February, 1766, as appears to have been due at the time of the said decree, after deducting thereout the sums mentioned in the Master's Report of 25th June, 1811, to have been improperly included therein, ought to be considered as a principal debt due from the said Sir W. Parsons deceased, with

Formal judgment.

June 20, 1816. " interest thereon from the date of the said decree of 26th
 " February, 1766, as directed by the said decree, and acknow-
 AGREEMENT. " ledged by the deed of 15th July, 1783, in the pleadings
 —SPEC. PER. " mentioned; and that such debt ought to be considered as
 —WAIVER— " secured by the mortgage made by the said Sir W. Parsons
 ACCOUNT.— " of the lands comprised in the said contract, and by the
 INTEREST.— " judgments obtained by the said M. Sterling, or assigned to
 MORTGAGE, " him as in the pleadings mentioned, and not comprised in
 &c. " the said deed of 15th July, 1783; and it is further declared
 " that the Appellant is to be considered in equity as a cre-
 " ditor generally on the assets, real and personal, of the said
 " Sir W. Parsons, his late father, for the sum of 15,000*l.*,
 " raised by mortgage to W. Browne, of the settled estates
 " in the pleadings mentioned, and for the interest accrued
 " due on the said 15,000*l.* and paid by the Appellant since
 " the death of the said Sir W. Parsons: and it is declared
 " also that as to so much of the said sum of 15,000*l.* as has
 " been applied in discharge of debts and incumbrances affect-
 " ing the real estates of the said Sir W. Parsons descended to
 " the Appellant as aforesaid, the Appellant is entitled to stand
 " in the place of the persons who were respectively entitled
 " to such debts and incumbrances according to their respective
 " priorities, except as to the sum of 2,500*l.* paid out of the
 " money advanced by the said W. Browne, to the said Lucy
 " Sterling deceased, and except as to the judgments assigned
 " by the said Lucy Sterling to the said W. Browne, which,
 " according to the terms of the said deed of 15th July, 1783,
 " cannot be claimed by the Appellant against the assets of the
 " said Sir W. Parsons to the prejudice of the Respondents:
 " and it is further declared that the Appellant is entitled to
 " have credit out of the real estates descended to him, includ-
 " ing the estates charged by the will of the said Sir W. Par-
 " sons with payment of his judgment debts, for the several
 " sums paid by the Appellant in discharge of debts and
 " incumbrances affecting the said estates respectively accord-
 " ing to their respective priorities; and that the Appellant is
 " entitled, as against the Respondents, to credit out of the
 " rents and profits of such descended estates, considered as

"real assets, or as subject to the mortgage or judgments June 29, 1816.
 "claimed by the Respondents, for such payments as have
 "been made by him, prior to the filing of the Respondent's **AGREEMENT.**
 "bill, in discharge of interest of debts by mortgage or judg- **—SPEC. PER.**
 "ment affecting such real assets, whether prior or subsequent **—WAIVER.—**
 "to the Respondent's demands; and that the Appellant is en- **INTEREST.—**
 "titled to have credit out of the sums of 12,000*l.* and 6000*l.* **MORTGAGE,**
 "in the pleadings mentioned for all such sums of money as **&c.**
 "were payable out of such sums of 12,000*l.* and 6000*l.* re-
 "spectively which have been discharged out of the said sum
 "of 15,000*l.*, raised by such mortgage as aforesaid, or by
 "the Appellant, in preference to any demand of the Re-
 "spondent's upon the said sums of 12,000*l.* and 6000*l.*, and
 "that the Respondents can be entitled to no demand against
 "the Appellant in respect of the said sums of 12,000*l.* and
 "6000*l.*, or either of them, except as creditors of the said Sir
 "William Parsons, deceased, and which the said Sir William
 "might have had if living: and subject to the said orders
 "and declarations, it is further ordered, That the said cause
 "be remitted back to the Court of Chancery in Ireland to
 "do therein as shall be just.

Agent for Appellant, LANE.

Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Ivory and Co.—*Appellants.*

Gourlay—*Respondent.*

Feb. 21, 23,
1816.

Though a merchant's books may, by the law of Scotland,
 afford a *semiplena probatio* in his own favour, yet in order

MERCHANT'S
BOOKS.—
EVIDENCE.

Feb. 21, 23,
1816.

MERCHANT'S
BOOKS.—
EVIDENCE.

to have this effect they must be regularly kept; for otherwise no man could be safe in dealing with another : and even honest demands can be enforced only in a manner consistent with general policy, and the interests of the community.

Claim.

Action.

Defence.

IN 1803, Ivory and Co., flax manufacturers at Douglas town, in the county of Forfar, became insolvent, and a sequestration (in the nature of a commission of bankrupt) was issued. Gourlay, merchant in Dundee, entered his claim for 1437*l.* for flax furnished. The trustee in the sequestration rejected the claim, and in 1804 an action was brought before the Sheriff to recover the above sum, being the price of four several parcels of flax ; the first alleged to have been furnished in 1797, the second in 1799, the third in 1800, and the fourth in 1802. The defence was, that there was no evidence that any of the parcels had been furnished, and that the second article had been introduced solely for the purpose of saving the first from the triennial prescription which, as there was no evidence of the furnishing of the second article, had run upon the first supposing it to have been furnished. The Sheriff decided in favour of the claim, and the cause was removed into the Court of Session by advocacy.

Merchant's
books.

First article.

Under a remit from the Lord Ordinary an accountant examined the books, and he reported that first article was regularly entered in the day book of Frederick Gourlay, under whom the Respondent, Gersham Gourlay, claimed ; that the amount was transferred to the ledger, and that an account of it

had been produced entitled on the back, in Ivory's hand-writing, "Gourlay's flax, 1796;" the delivery appearing to have taken place in 1796, though the price was stated in Gourlay's books to have been due in 1797.

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The second article was also entered in Gourlay's books, but placed to the debit of one Sturrock, a flax manufacturer who had become insolvent before Ivory and Co., and with whom Ivory and Co. had some dealings. This, in a different hand-writing from that of the original entry, was *by a marking on the margin*, without date, transferred to the debit of Ivory and Co. This article was in the ledger carried to the debit of Ivory and Co. and appeared not to have been charged against the estate of Sturrock. The accountant however was of opinion that the irregularity of the entry was such as to deprive it of that decree of credit which would have been due to it if originally made to the debit of Ivory and Co.

As to the third article it was entered in Gourlay's books, but the entry in the day-book was inserted at the bottom of a page, out of the regular order of dates; and the accountant was of opinion that it had been interpolated, and that the Pursuer was not entitled to found upon Gourlay's books, in support of this article. But there was an entry in the receiving books of Ivory and Co., of flax received at different times from the 7th of March to the 29th of April, 1801; and Sturrock having deponed that he assisted in the purchase of a quantity of flax for Ivory and Co. from F. Gourlay and the Pursuer, but in what year he did not recollect, the accountant thought it might be presumed that the

Feb. 21, 23.
1816.

MERCHANT'S
BOOKS—
EVIDENCE.

Fourth article.

Judgment below, all the articles proved.

Err. lib. 4.
tit. 2. s. 4.

Judgment.

parcel in question might be part of this box, and therefore reported that sufficient evidence had been adduced to prove the delivery of the third article.

The fourth article was regularly entered in Gourlay's books, and in those of Ivory and Co., and, on the appeal, was not disputed.

The Lord Ordinary and Court of Session were of opinion that the evidence was sufficient to prove the delivery of all the articles, and decreed for payment of the whole demand. From this judgment Ivory and Co. appealed.

It was contended for the Appellant that the entries in the books of Gourlay were by themselves *semiplena probatio*, and, with the Pursuer's oath in supplement, and evidence of Starrock, ought to be considered as full evidence of the delivery. On the other hand, it was contended that these books were too irregularly kept to be relied on as to the second and third articles, and that these being out of the question, the price of the first was extinguished by the triennial prescription.

Lord Eldon (C.) If a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, they ought at least to be more regularly kept than these are: for no man can be safe in dealing with another, if books so irregularly kept are to be admitted as evidence. The whole demand may be honest; but there are many honest demands which, on grounds of general policy, cannot be enforced, on account of the danger to the interests of the community; and if persons will keep their books in this way they must bear the loss.

Judgment:—"That there was sufficient proof to
 "sustain the demand in respect of the first article,
 "unless barred by prescription; that there was not
 "sufficient evidence to sustain the demand as to
 "the second and third articles; but the finding to be
 "without prejudice to the instituting of any other
 "suit in relation to the third article, in case the Pur-
 "suer should allege that any thing was due to him
 "in respect thereof, otherwise than as represented
 "in this account; and that there was sufficient
 "proof as to the fourth article: and with these
 "findings the cause was remitted."

Feb. 21, 23,
1816.

MERCHANT'S
BOOKS.—
EVIDENCE.

Formal judgment. Second and third articles not proved.

Agents for Appellants, SPOTTISWOODE AND ROBERTSON.
 Agent for Respondent, RICHARDSON.

NOTE.—In the cases of "Jones v. Hancock," and "Long v. Hancock," p. 145, it ought to have been stated in p. 150, in addition to the statement as to the heir-at-law's case, that on the ejectment by the heir of Hugh Henry, the ultimate devisee, the judgment in K. B. was against the lessor of the Plaintiff, and that that judgment was affirmed by the Court of Exchequer Chamber. Vid. Index, or Table of Contents, tit. DEVISE.

In the case of Stacpoole v. Stacpoole, p. 221, by the words "nothing was said upon this point" (viz. whether such of the next of kin as did not appeal against a decree were entitled to the benefit of the appeal of one who did appeal) "*in the ultimate judgment*," it was meant that nothing was said about the point in the speech in judgment; for it will be perceived, from the abstract of the formal judgment, that they were, though nothing was said about it in the speech in judgment, in fact held entitled to the benefit of the original appeal, having been first made parties to the original and cross appeals, as Respondent.—Vid. Index, tit. APPEAL.



INDEX.

A.

ACCOUNT.

(*Vide* ADMINISTRATOR—ATTORNEY.)

ATTORNEY and agent advances money to his client and principal in various sums and at different periods, from 1773 to 1778, taking securities and getting accounts settled. The transactions impeached in 1783, and decree of the Court below, and orders of the Lords proceeding upon its principle, that the settled accounts should be opened, and the whole transactions sifted; and that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced, and proved to be so by other evidence than the securities and settlement of accounts.

But as in the case of accounts in some sense settled, and a considerable period elapsing before they were impeached, vouchers might have been delivered up or lost, the oath of the party admitted as evidence as to the existence and import of such vouchers.

VOL. IV.

Attorney procures money on mortgage for his client from other clients; and gives up to the client, mortgagor, a bond obtained from that client in respect of separate transactions between themselves as part consideration of the mortgage. A separate account ordered as to the mortgage transaction, in order to clear the estates, the attorney being in possession as agent for the mortgagees, and the account confined to the money actually advanced by the clients the mortgagees, and the mortgage security cut down as to the other alleged part consideration, which is referred to a general account between the attorney and the client the mortgagor.

The attorney not allowed to take timber felled on the mortgaged estates in execution for his private debt, the timber being part of the security of the mortgagees, and the produce goes in discharge of the mortgage account. (*Morgan v. Lewes*, (English,) 29, 30, 50, 51, 52, 53.)

An administrator charged with the full legal interest on a sum retained by him undistributed, though twenty years had elapsed before effectual suit for account com-

menced; and the account ordered to be taken with annual rests during the period of retention. (*Stacpoole v. Stacpoole*, (Irish,) 210.)

A Court of justice in England would hardly proceed on the footing of an account made up under the control and by the directions of one of the parties only. (*Montgomery v. Wauchope*, (Scotch,) 125.)

Objection to a decree made in 1812, that it ordered payment of a sum found due and directed to be paid with interest, by a decree made in 1766, on the foot of accounts settled in 1756 and 1761, between attorney and client, in which the attorney charged interest upon interest, with interest on the consolidated sum from 1766 to 1812. That sum acknowledged by the objecting party, by solemn deed in 1783, to be due with interest, and the objection comes too late; though if objections had been recently made, for the purpose of opening the accounts, they could hardly have failed of being effectual. (*Rosse v. Sterling*, (Irish,) 442.)

ACQUIESCENCE.

(*Vide* TIME—CONTRACT—ACCOUNT.)

LENGTH of time, or long acquiescence in a transaction, may be a bar to relief in cases where the transaction, if impeached within a reasonable time, would be set aside.

Therefore where a fee farm grant, or lease at a fixed rent, was made of mortgaged premises by the mortgagor to the mortgagee, in which there was an acquiescence for nearly fifty years, though the transaction was of a nature to be set aside, if impeached within a reasonable time, the House of Lords, affirming the decree below, held that length of time was a bar to the relief.

Dicente Lord Eldon, (C.) that the transaction was one of that description which Courts of Equity always regarded with a great deal of jealousy.

Dicente Lord Redesdale, that the only proper principle was that no contract for a beneficial interest out of the mortgaged premises from the mortgagor to the mortgagee, where the mortgage continued, if impeached within a reasonable time, ought to stand. (*Hickes v. Cooke*, (Irish,) 16, 17.)

Acquiescence for a long time is material evidence to show that a contract is fair, though it is of that kind which Courts of Equity look at with great jealousy. (*ib.* 24.)

The change which, in a long course of time, takes place in the value and circumstances of property, and the consequent difficulty or impossibility of doing that justice between the parties, which may be done when transactions are recently challenged, are reasons why length of time is a bar to relief in cases where the transactions, if

recently impeached, would be set aside. (*ib.* 27, 28.)

ADMINISTRATOR.

(*Vide ACCOUNT.*)

ADMINISTRATION taken out in 1771.

Distribution to a certain extent made, but a large sum retained by the administrator on unfounded pretences. No effectual suit against the administrator till 1792, and that protracted, in a great measure, by the administrator's fault till 1810. Held by the House of Lords, reversing in that respect decrees of the Irish Chancery, that, notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, about 16,000*l.* or 17,000*l.*, during the whole period of retention; and that the account should be taken with annual rests, and that interest should be charged on the annual balances; and that the administrator should pay to the Plaintiff his costs of suit incurred subsequent to the original decree, &c. (*Stackpole v. Stackpole*, (Irish,) 209, 210, 229.)

AGENT.

(*Vide ACCOUNT.—ATTORNEY.*)

Lr A. lends money to the agent of B. and takes the security of B.

his security is the evidence of his debt, and he has no concern with the transaction between B. and his agent. If an agent obtains a bond from his principal by misrepresentation, the bond cannot be taken as evidence of the debt. An attorney, who is both agent and adviser, is liable to a more strict rule, and every shilling must be proved by the attorney, otherwise the client is not bound. (*Morgan v. Lewes*, (English,) 51.)

When one acts as agent for another on the one side, and for himself on the other, he is bound to make the transaction very clear; and the Court throws upon him that burthen of proof, which, in ordinary cases, would be on the other party. (*ib.* 45.)

Agent and attorney bound to keep regular accounts. (*ib.* 52.)

"In a case in Dom. Proc. under the names of *Kamer* and *Fisher*, or some such names, an agent was called to the bar and censured for printing observations without signature of counsel." *Per* Lord Chancellor. (*Stackpole v. Stackpole*,) (Irish,) 223.)

Whether a trustee, appointed by his co-trustees agent and manager of the trust fund, can support a claim to an allowance for his services as agent? (*Montgomery v. Wauchope*, (Scotch,) 129.)

The appointment of a trustee to act as agent and manager in relation to the trust fund, with a view

to be paid as an agent for his services, would hardly be permitted in England. (*ib.* 122, 123.)

AGREEMENT.

(*Vide* ACCOUNT—CONTRACT—DECREET (ARBITRAL).)

WHERE an agreement was carried into execution under the form of a decreet arbitral or award, held that the decreet arbitral was not binding as such. (*Maule v. Maule*, (Scotch,) 363.)

Bill in 1805, for performance of an agreement made in 1761, for sale of lands, and decreed accordingly below; but the decree reversed in Dom. Proc., Defendant having been left in possession as owner for a long time; and Plaintiff having done acts inconsistent with the notion of his being owner himself, which was consistent as amounting to a waiver. (*Rosse v. Sterling*, (Irish,) 442.)

AMBIGUITY.

(*Vide* DEVISE—WILL—EVIDENCE.)

EXTRINSIC evidence is admissible to explain a will only where an ambiguity is raised by extrinsic circumstances. (*Doe, d. Ozenden, v. Chichester*, (English,) 93.)

APPEAL.

(*Vide* MORTGAGE—PRACTICE.)

BILL by next of kin against administrator, and decree below

against next of kin as to some material points. One of the next of kin appeals, and the others do not. Administrator lodges a cross appeal against the decree below, so far as it was against him, without making the other next of kin parties. The appeals ordered to stand over for defect of parties; and then, on petitions of the Appellant and cross Appellant, the other next of kin ordered to put in their answers, and made Respondents in both appeals, and claim the benefit of the original appeal; and also insist that the decree was erroneous in a particular not objected to by the original appeal. It was questioned at the bar whether the next of kin, who had not appealed from the decree, could be entitled to the benefit of the appeal by the one who did appeal. Nothing said as to that in the speech in judgment, but by the final or formal judgment they were, in fact, so made entitled, after having been made Respondents as above mentioned. (*Stacpoole v. Stacpoole*, (Irish,) 218, 219, 221.)

Solicitor takes a mortgage of the estate of his client, pending a suit relative to that estate, for money advanced and costs, but does not make himself a party to the suit. Decree below against the client, who refuses to appeal. Whether the solicitor can appeal in the client's name. (*Daly v. Kelly*, (Irish,) 428.)

ATTORNEY.

(*Vide* ACCOUNT—AGENT—MORTGAGE.)

ATTORNEY advances money to his client, and accounts settled between them. The settled accounts opened, though not challenged for a considerable length of time. But, as vouchers might have been lost, the oath of the attorney admitted as to the existence and import of such vouchers. (*Morgan v. Lewis*, (English,) 47, 48.)

Attorney dealing with his client is bound to show that he acted as much for his client's interest as his own. (*ib.* 47.)

Attorney bound to keep regular accounts. (*ib.* 52.)

When an attorney takes securities from his client which do not express the real nature of the transaction, it is incumbent on him, by other evidence than the securities, to show what was the real nature of the transaction, and what sums were really advanced. (*ib.* 53, 54.)

Where an attorney procured money from others for his client on mortgage, and had dealings, on his own account, with his client, a separate account ordered to be first taken between the client and mortgagees, and then a general account between the attorney and client. (*ib.* 47.)

AWARD.

(*Vide* DECRET (ARBITRAL).)

AN award or decret arbitral not

valid or binding as such, if used as a cloak for a transaction of a different nature. (*Maule v. Maule*, (Scotch,) 363.)

B.

BILL (OF EXCHANGE).

ACTION by indorsee of a bill of exchange against the acceptor. Declaration states in first count, that payment was demanded at the place where the bill was made payable, without averring that payment was there *refused*: and after other counts, declaration states, in conclusion, that the acceptor had not paid any of the sums in the declaration mentioned. Judgment entered up generally on the whole declaration, and error brought for want of averment, in the first count, of a *refusal* to pay, at the place where the bill was made payable. Held to be no error. (*Benson v. White*, (English,) 334.)

BOOKS (MERCHANTS).

THOUGH a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, yet, in order to have this effect, they must be regularly kept; for otherwise no man could be safe in dealing with another: and even honest demands can be enforced only in a manner consistent with

general policy, and the interests of the community. (*Ivory v. Gourlay*, (Scotch,) 467, 468, 470.)

C.

CHURCH.

ON refusal of the heritors of a parish to take the proper steps to rebuild a parish church, found by the presbytery to be so ruinous as to be incapable of repair, the presbytery itself advertises for and adopts a plan and estimate, and contracts for the rebuilding, and assesses the heritors for the necessary sums; but neglects to assess some feuars of a part of a small village included in the parish. Suspension presented by the adverse heritors against the charge for the sums, on the ground of irregularity in the proceedings of the presbytery; but all objection to the jurisdiction of the presbytery to assess, on refusal by the heritors to act, abandoned in this case. Suspension refused below, and judgment affirmed in Dom. Proc., with a remit as to the feuars. (*Maxwell v. Gordon*, (Scotch,) 279.)

CONCEALMENT.

(*Vide INSURANCE.*)

INSURANCE on goods, premium ten guineas per cent., to return five per cent. for convoy and arrival. The

assured known, but conceals from the underwriter, that the vessel was to be a running ship. This is a concealment of fact material to the risk, and voids the policy. (*Reid v. Harvey*, (Scotch,) 97.)

CONTRACT.

(*Vide MARRIAGE—ACQUIESCENCE—AGREEMENT.*)

A. CONVEYS (or assigns his interest in) lands to B., in consideration, among other things, that B. should make or give back a lease to A. of a half or portion of the lands, and in consideration also of a loan of 200*l.* by B. to A. B. covenants to execute the lease accordingly, subject to the repayment of the 200*l.*, for which B. has a judgment. No lease actually made, but A. remains in possession of his portion on his equitable title. B. lends further sums to A., and obtains judgments for these sums, and then conveys the whole lands, and assigns the judgments to C. C. issues writs of *fi. fa.* on the judgments, and, in 1781, procures a sale by the sheriff of A's interest in the lands; and, on ejectment brought on the demise of the purchaser and of C., A. is turned out of possession. A., in 1782, files his bill in Chancery for relief and execution of a lease to him according to the agreement; but, from embarrassment in his circumstances, does not further prosecute the suit till 1801. No steps taken

in the interval to dismiss the bill. In 1808 the bill dismissed below. The decree of dismissal reversed in Dom. Proc. for, 1st, The right to a suit in equity is not a proper subject of sale by the sheriff under a *fi. fa.*, and the sale is a nullity; 2d, The delay in prosecuting the suit is well accounted for, and no steps were taken by the Defendant to dismiss the bill; and at any rate the right to the lease does not rest merely on the landlord's covenant, but is part of the consideration of that conveyance or assignment by which the landlord himself acquired his title. Therefore the principle of delay does not apply, and A. ought still to have his lease executed in terms of the contract; and has his relief in equity without the necessity of resorting to the Court out of which the *fi. fa.* issued. (*Moore v. Blake*, (Irish,) 231.)

No contract for a beneficial interest out of mortgaged premises from mortgagor to mortgagee where the mortgage continues, if impeached within a reasonable time, ought to stand. This is the only proper principle with respect to such a transaction. *Per* Lord Redesdale. (*Hickes v. Cooke*, (Irish,) 17, 26, 28.)

COSTS.

(*Vide* RECEIVER — TRUSTEE — INTEREST — ACCOUNT — ADMINISTRATOR — MORTGAGE.)

WHERE the Attorney-General in behalf of the crown sued for

money, and the Defendant resisted the payment, though the crown succeeded in the suit, yet as there was a reasonable doubt whether the money did not belong to other parties, it was held to be too much to visit the Defendant with the crown's costs. (*Mucklow v. Attorney-General*, (English,) 12, 16.) Where administrator retained a sum undistributed, and no effectual suit commenced for twenty years, as the suit after it had been commenced was protracted for a considerable time by unfounded demands set up by the administrator, held that the administrator should pay Plaintiff's costs incurred since the original decree. (*Stacpoole v. Stacpoole*, (Irish,) 210.)

CUSTODY.

(*Vide* TITHES—EVIDENCE.)

THE custody of an individual, owner of lands which formerly belonged to an abbey, held a proper custody for the Chartulary or Ledger-Book of that abbey, with reference to the admission of the Chartulary as evidence. (*Bullen v. Michel*, (English,) 333.)

D.

DECREE.

(*Vide* ACCOUNT—SALE—FRAUD.)

DECREET (ARBITRAL).

SUBMISSION and decretet arbitral in

1782 between A. and B., the latter taking burthen upon him for his son C., a minor, whose interest was concerned. B. dies in 1789, and C. comes of age in 1794, and does various acts under the decret arbitral, believing it to be a *bond fide* submission and award. In 1809 C. discovers the uncorrected scroll of the submission, and letters of one of the arbiters, from which it appears that the arbiters had not been left to the free exercise of their own judgment on the matters referred to them, but had been bound down by a previous agreement or compromise between the parties; so that the transaction was in reality an agreement to be carried into execution under the colour of an award. Held by the House of Lords, reversing the judgment of the Court of Session, that under these circumstances, and upon this evidence, the transaction was not a valid decret arbitral, nor binding as such upon C. (*Maule v. Maule*, (Scotch,) 363.)

DELAY.

(*Vide* TIME—CONTRACT—ADMINISTRATOR—ACQUIESCENCE.)

DELAY to prosecute a suit from 1782 till 1801. No step taken in the interval by Defendant to dismiss the bill. The delay no bar to the relief. (*Moore v. Blake*, (Irish,) 247.)

Administrator held liable to pay a sum remaining undistributed, with the highest legal interest during

the period of retention, and with annual rests; notwithstanding a delay of twenty years before effectual suit for account. (*Stacpoole v. Stacpoole*, (Irish,) 209.)

DEVISE.

(*Vide* EVIDENCE.)

WHERE lands at or of any particular place are devised, parol or extrinsic evidence is not admissible to show that the devisor included under the description, and intended to pass, other lands not at that particular place.

And, therefore, where one having lands in the manor of Ashton, in Ashton parish, and also other lands in several of the neighbouring parishes, made his will and devised lands under the description and name of "my estate of Ashton;" and parol or extrinsic evidence was offered to show that the testator in his life-time was accustomed to designate the whole of the lands derived from his mother, including not only the estate at Ashton, but also the lands in the neighbouring parishes, by the general name of his "Ashton estate;" the House of Lords, concurring in the unanimous opinion of the Judges, held that the evidence had been properly rejected. (*Doe, d. Oxenden, v. Chichester*, (English,) 65, 91.)

Extrinsic evidence is admissible to explain the intention of a devisor in his will only where an ambiguity is raised by extrinsic circumstances: and there it is admitted

from the necessity of the case, because the will cannot have effect without it. One devises his estate of B., and has two estates called B.; extrinsic evidence must be admitted to show which of them is meant. So if one devises to his son, John Thomas, and has two sons of that name, extrinsic evidence must be admitted to show which John Thomas is meant. And so if one devises to his nephew William Smith, and has no nephew answering the description, evidence must be admitted to show which of his nephews the testator intended by a description not strictly applying to any of them. (*ibid.* 93.)

Testator devises his estates to his eldest daughter A. for life; remainder to her first and other sons in tail male; remainder to his daughter F. for life; remainder to her first and other sons in tail male; remainder to the first and every other daughter of A.; remainder to the first and every daughter of F.; and then adds this proviso or condition; "But I give, devise, and bequeath all my estates above-mentioned to my eldest daughter A. on this proviso, and express condition, that she marry a man really and bona fide possessed of a property at least equal to, if not greater than, the one I leave her; and if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property

of the man she marries; and all the remainder of my property shall immediately pass over and be given up to my second daughter F., to whom, in that case, I bequeath it." Held by the House of Lords, concurring in the unanimous opinion of the Judges, that the devise over was void for the uncertainty, the specific portion or share given over not appearing on the face of the will itself. (*Jones, d. Henry, v. Hancock*, (Irish,) 145, 198, 199, 201.)

Testator devises to A., for life; remainder to her first and other sons in tail male; remainder to F. for life; remainder to her first and other sons in tail male; remainder to the first and every daughter of A.; remainder to the first and every daughter of F.; with the proviso, as before, that in case A. married a man of less fortune than the testator left her as above, the excess of his, the testator's, property, beyond that of the husband, was to go over to F.; and then, after stating his intention that the proviso should apply to F. in case, by the death of A., she came before her marriage to be possessed of his estates, he concludes: "And I will and devise that, in case my two daughters die without issue, that my estates shall then go to my brother Hugh Henry." F. died in the testator's life-time. A. married a man of inferior fortune, and then the heir at law of the testator, and the heir of Hugh

Henry, the ultimate devisee, brought ejectments against A. and her husband to recover the excess beyond the husband's fortune. For the heir of Hugh it was contended that A.'s estate in the excess was forfeited, and that this was not a condition for breach of which the heir at law might enter, but a conditional limitation, and that the extinguishment of the previous limitation by the death of F. only accelerated the limitation to Hugh. For the heir at law it was contended that Hugh could only take on failure of issue of both A. and F., which had not happened, and that it was the manifest intent that the estate of A. in the excess should, on the breach, be forfeited as to herself and her issue; and that such excess must go to the heir at law as undisposed of. For A., and her husband, it was contended that A. must of necessity take, in the whole, a remainder in tail general by implication, to effectuate the intention of the testator; for otherwise all her issue could not take, there being no limitation to the daughters of sons, nor to the children of daughters, and yet the estate was not to go over until a failure of her issue. The Court of King's Bench, and Exchequer Chamber below, decided against the heir of Hugh. The Court of King's Bench decided in favour of the heir at law of the testator; but the judgment was reversed by the Court of Exchequer Chamber, and

the judgment in the other cause affirmed; the opinion of that Court being in favour of A. and her husband in both causes. In Dom. Proc. the question was decided on a different ground, as before-mentioned, in favour of A., so far as her life estate in the whole was concerned; the Lord Chancellor, however, observing that, even in the view taken of the case below, he was inclined to consider the judgment of the Exchequer Chamber as the better judgment; and that, though it had not been so on the principles stated below, it would be very difficult, under the words of this will, to support either of the ejectments. (*ib.* 203, 209.)

E.

EDINBURGH.

ANY master trader or manufacturer exercising his trade or calling in the new town of Edinburgh only, without exercising it in the old, is, by the proviso in the act 7 Geo. 3. cap. 27. exempted from the payment of the tax called entry money, exacted by the magistrates of Edinburgh from those who enter as burgesses. (*Sprott v. Scott*, (Scotch,) 290.)

ENDOWMENT.

(*Vide* TITHES—EVIDENCE.)

AN endowment, stating the portions of tithe assigned to the vicarage,

and the value of each particular, held to be proper evidence on the trial of an issue as to a farm *modus*. (*Bullen v. Michel*, (English,) 332.)

EQUITY.

(*Vide TITHES—TRIAL—ISSUE.*)

It is not the principle of a Court of Equity, merely because there is a question of fact which may be tried by a Jury, to send it to be so tried. (*Bullen v. Michel*, (English,) 329.)

ERROR.

(*Vide BILL.*)

EVIDENCE.

(*Vide TITHES—DEVISE—BOOKS.*)

ENTRIES, supposed to be a copy of, or extract from, an endowment (the original endowment being lost), in a book called a Chartulary of an abbey, containing, along with entries relative to the concerns of the abbey, much miscellaneous matter, and found in the custody of an individual having lands which had belonged to the abbey, read as evidence of the value of the vicarage at the time of the endowment, for the purpose of proving rankness, on an issue between a vicar and a parishioner respecting a farm *modus*. The entries were without date, but were proved to be of the hand-writing of the 13th or 14th centuries. (*Bullen v. Michel*, (English,) 320.)

On an issue between a vicar and a parishioner respecting a farm

modus, a rate-paper, from which the tithe rates for the whole parish had been collected for a period of about seventy years, read as evidence to show that if the rate, paid in lieu of tithes in kind for the farm in question, was a *modus*, the whole parish was covered with these *modusses*; and that the total amount was of such a size that it was incredible it should have existed as a money payment so far back as the time of legal memory. (*ib.* 328.)

Where, on the trial of an issue out of equity, evidence is improperly rejected, if the Court is satisfied that, though that evidence had been received, it ought not to have produced a verdict different from that which has been given on other evidence, the refusal to grant a new trial is in the proper course of proceeding. (*ib.* 318, 319.)

If a Court of Equity is not bound to grant a new trial though, on an issue out of that Court, evidence has been rejected which ought to have been admitted, provided the verdict is right on other evidence; it is a nice distinction to say that, on account of the admission of evidence which ought to have been rejected, a new trial ought to be granted, though the verdict should be right without the evidence so improperly admitted. (*ib.* 319, 320.)

Acquiescence for a long time is material evidence to show that a contract was fair, though it be of that kind which Courts of equity look

at with great jealousy. (*Hickes v. Cooke*, (Irish,) 24, 25.)

In conveyances by lease and release, in Ireland, it is not, it seems, the practice to make a lease for a year, the recital in the release being held as conclusive evidence of the lease, (*Daly v. Kelly*, (Irish,) 435.)

Where lands *of* or *at* a particular place are devised, extrinsic evidence is not to be admitted to show that the deviser intended to include lands not in that place. (*Doc. d. Oxenden, v. Chichester*, (English,) 92, 93.)

A merchant's books, with the oath in supplement, are, by the law of Scotland, evidence for himself. But, in order to be admitted for that purpose, they must have been regularly kept. (*Ivory v. Gourlay*, (Scotch,) 470.)

F.

FRAUD.

(*Vide* ACCOUNT—CONCEALMENT.)

A., TENANT for life under a marriage settlement, remainder to his first and other sons in tail, with power to A. to lease at the best rent for 31 years, or three lives in possession without taking fines, &c. makes leases at an under-value, taking fines, &c. and grants annuities for lives of the grantees in violation of the power. Suit in 1772 by incumbrancers, and the usual decree made; the son, re-

mainder-man in tail, being then an infant eleven years of age. Master reports amount of the incumbrances, without stating yearly value of the estates, or the parts proper to be sold, though directed to do so by decree, and no exception taken by A. nor by any person for the infant. Sale before Master of part of the lands to B. at an under-value by collusion and management between B. and A. and A.'s agent, each of whom take some advantage from the transaction to the prejudice of the infant entitled to the inheritance, B. being cognizant of the leases and annuities made and granted in violation of the power, and of the whole circumstances. A. dies in 1794, when the son was prisoner in France. Bill by the son in 1800, to set aside the sale as fraudulent as against him, and the above circumstances proved. Bill dismissed in 1808, in Ireland; but the decree reversed by the House of Lords, and the sale set aside as fraudulent as against the son. (*Colclough v. Bolger*, (Irish,) 54, 63.)

I.

INFANT.

(*Vide* FRAUD—PRACTICE.)

DEOREE for sale of estates to pay debts and incumbrances on a bill to which an infant, remainder-man in tail, was a party. The sale effected at an under-value, to the

prejudice of the infant, by fraud and collusion between tenant for life and purchaser. Bill by the infant when of age to set aside the sale as fraudulent as against him, and adjudged in Dom. Proc. accordingly. (*Colclough v. Bolger*, (Irish,) 54, 64.)

The practice of giving infants an opportunity of showing cause, when they come of age, against decrees made against them, little attended to in Ireland, till the Irish practice was in that respect reformed by Lord Redesdale. (*ib.* 62.)

INSURANCE.

INSURANCE "on goods *per* Nancy, "Captain Johnson, from Lisbon to "Clyde, premium ten guineas per "cent. to return five per cent for "convoy and arrival." By instructions to make insurance, and a representation in these terms, the underwriter is made to believe that there is a chance of the vessel's sailing with convoy, and that he undertakes an alternative risk, and the contract is not an insurance at the higher premium against all hazards, independent of the chance of the diminished risk, though at a lower premium; but the alternative is a constituent part of the contract, and a material part, because, though the underwriter undertakes the entire risk at the higher premium combined with the chance of diminished risk with a lower premium, the entire risk standing alone,

without the chance or alternative, might be one which he would not undertake at the higher premium, or would not undertake at all. And therefore, where parties procured insurances to be effected upon, a representation as above, knowing at the time that the vessel was to be a running ship, and before the last insurance was effected that she had in fact sailed without convoy, but not communicating these facts to the underwriters, it was held to be a concealment of fact material to the risk, and that the policies were void. (*Reid v. Harvey*, (Scotch,) 97, 107, 108.)

Ship sails, and soon after encounters a storm, becomes leaky, puts back, and is found, on survey, to be materially decayed, and damage discovered which could not fairly be considered as the effect of the storm. Held by the House of Lords, reversing a judgment of the Court below, that the ship was not sea-worthy when she sailed on the voyage insured. The Lord Chancellor observing that nothing, in the law of insurance, was more important than the implied warranty of sea-worthiness, with a view to the benefit of commerce and the preservation of human life; that in a question as to sea-worthiness, honesty of intention is no answer, but that the fact of sea-worthiness must appear, or otherwise that the underwriter is discharged; and that, though a vessel after sailing encounters a storm,

yet unless the damage, which renders her unfit for the voyage, can be fairly considered as the effect of the storm, the implied warranty is not complied with. (*Douglas v. Scougall*, (Scotch,) 269.)

INTENTION (OF TESTATOR).

(*Vide* DEVISE—WILL.)

EXTRINSIC evidence admissible to explain the intention of a testator only where an ambiguity is raised by extrinsic circumstances. (*Doe, d. Oxenden, v. Chichester*, (English,) 93.)

INTEREST.

(*Vide* RECEIVER—ACCOUNT—ADMINISTRATOR.)

WHERE an officer of the customs received money as fees from the merchants, which had been paid to officers called king's waiters till the abolition of their offices by act of parliament, and the money remained in his hands for some time unappropriated, he not knowing to whom he was accountable for it, or could safely pay it, till it was afterwards appropriated by act of parliament, though he admitted in his answer to a crown information, that he had mixed the money with his own, and so made profit of it; it was held that he ought not to be charged with that profit nor with interest, during the period the money remained unappropriated. (*Mucklow v. Attorney-General*, (English,) 12.)

The highest legal interest charged on

annual balances of account taken against administrator during the period of retention, by him, of money, which he ought to have distributed, though no effectual suit for distribution commenced for a period of twenty years. (*Stacpoole v. Stacpoole*, (Irish,) 209, 220.)

Where a public officer suffers the duties which he ought to collect to be in arrear, and exacts interest on the arrear from the private party, the interest belongs to the officer or to the public, and the question is between them, and the private party has no reason to complain, and cannot recover the interest back again.

The Lord Chancellor observing that, where a decision is clearly right, the House of Lords will not remit merely because the ground of decision below has been different from the ground of its own decision.

ISSUE.

(*Vide* TITHES—EVIDENCE—TRIAL.)

A COURT of Equity may itself decide on facts without directing an issue, though, in the exercise of its judicial discretion, it does often call for the assistance of a Jury; but it is not bound to do so: and this is the case in tithe causes as well as in others: for the design of an issue out of a Court of Equity is to inform the conscience of the Court, and if the conscience of the Court is sufficiently informed, no issue need be directed, nor, if

an issue has been directed, need any new trial be granted. (*Bullen v. Michel*, (English,) 318, 319, 320, 339, 332.)

Miscarriage, in the conduct of a trial upon an issue out of Equity, is no conclusive reason for granting a new trial. Design of issues out of Equity often misunderstood at *Nisi Prius*. (*ib.* 330.)

L.

LEGITIMACY.

(*Vide* RENUNCIATION.)

Wife misconducts herself, and process for divorce commenced; but, before decree for the divorce, which was afterwards obtained, she is delivered of a child. The husband, having strong reason from the circumstances to conclude that the child was not his, never acknowledges it as such. No declarator of illegitimacy obtained; and the child, having been born *stante matrimonio*, must be considered as legitimate. (*Routledge v. Carruthers*, (Scotch,) 392.)

M.

MARRIAGE (CONTRACT).

(*Vide* RENUNCIATION.)

DAUGHTER, entitled under her father's marriage contract to suc-

ceed to his estate at his death, for a sum of money paid to her by the father, renounces the right of succession for herself and the heirs male of her body, who were also entitled to succeed under the same contract, and dies in the father's life time, leaving a son. What is the effect of the daughter's renunciation, and whether it is effectual as against her son? (*Routledge v. Carruthers*, (Scotch,) 392.)

MISTAKE.

(*Vide* TRUSTEE.)

A TRUSTEE, acting *bonâ fide* for the interest of the *cestui que trust*, ought not to suffer for mistake, unless he has very grossly mis-carried. (*Montgomery v. Wauchope*, (Scotch,) 130.)

MODUS.

(*Vide* TITHES—EVIDENCE.)

ON the trial of an issue, *modus* or no *modus*, for a particular farm which had paid a certain rate for tithe, for seventy years; a general rate-paper from which the rates, in lieu of tithes, for the whole parish had been collected, read as evidence to show that the whole parish had paid certain rates in lieu of tithes, in the same manner as this particular farm, and for the same period, in order to raise the inference that all the payments were *moduses*, or that none was so; and that, as the total amount of the payments was rank,

the payment for the particular farm could not be a *modus*. (*Bullen v. Michel*, (English,) 328.)

MORTGAGE.

(*Vide ACQUIESCENCE—TIME.*)

No contract for a beneficial interest out of mortgaged premises from the mortgagor to the mortgagee, where the mortgage continues, if impeached within a reasonable time, ought to stand. This is the only proper principle with respect to such a transaction. *Per Lord Redesdale.* (*Hickes v. Cooke*, (Irish,) 17, 26, 28.)

A. and B. claim under separate wills as devisees of C., and upon suit at the instance of A. the will in favour of B. set aside, and that in favour of A. established. B. then sets up a bond of the devisor for 40,000*l.*, being more than the value of the whole property, on which bond he brings action at law and obtains judgment, whereupon A. amends his bill, and prays and obtains injunction to restrain execution.

A. after the will in his favour had been established, and before action on the bond, gives to D., his solicitor and attorney, a mortgage of the lands devised as a security for past and future costs in the proceedings, and for money advanced by D. to A. D. does not make himself a party, but suffers the suit to proceed in the name of A. as the sole Plaintiff.

Decree in 1800 for payment of the

sum in the bond, with interest from the time of the devisor's death instead of from its date, so that the bond was partly relieved against; and *per Lord Redesdale* afterwards in Dom. Proc. the bill must be understood as having submitted to have the relief made effectual according to the rights of the parties. A. then compromises the suit, and refuses to appeal; and the whole property sold and purchased in trust for B. for a less sum than that reported due to him.

D. files his bill against A., B., and another, charging collusion and fraud, and praying that the decree of 1800 might be declared void as against him, and that he might be at liberty to appeal from it in the name of A. if that should appear to be for his advantage. Held below that the mortgage was valid as between D. and A., and that D. had a right to appeal in A.'s name. Appeal accordingly by D. in A.'s name in the cause A. v. B., and appeal against the decree authorizing that appeal.

The House of Lords, without deciding whether D. had a right to appeal in this way, refer back D.'s cause to the Court below for rehearing, that the Court might decide whether D. might not impeach the decree in the cause A. v. B. to the extent of his claims, by bill in the nature of a bill of review or otherwise, though the same remained in force against A. (*Daly v. Kelly*, (Irish,) 417.)

Father, tenant for life, borrows money, to secure which he and his son, remainder-man in tail or in fee, join in a mortgage of the inheritance. The son is entitled in Equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of his mortgage for the son's relief, &c. (*Rosse v. Sterling*, (Irish,) 442.)

O.

OATH.

(*Vide ATTORNEY—ACCOUNT.*)

OATH of the party admitted, where settled accounts were opened which had remained long unchallenged, as evidence of the existence and import of vouchers given up or lost. (*Morgan v. Lewes*, (English,) 38, 45.)

P.

PARTIES (TO A SUIT.)

(*Vide PRACTICE—MORTGAGE.*)

WHERE persons were made parties to a Crown information in Equity below, on the suggestion of a Defendant in his answer, that Defendant is precluded from availing himself, on appeal, of the objection that these persons ought

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not to be parties. (*Mucklow v. Attorney General*, (English,) 9.)

Whether one becoming mortgagee of an estate in litigation, *pendente lite*, without making himself a party to the suit below, may appeal from the decree in the name of the party mortgagor, who refuses to appeal. (*Daly v. Kelly*, (Irish,) 428.)

POWER.

In this case a tenant for life, having a power to raise a sum of money out of the settled estates, granted an annuity charged on these estates till a certain sum should be paid off, without, in the annuity deed, referring to the power. Held that this, under the particular circumstances of the case, was a good, though informal, execution of the power. The particular circumstances were chiefly, that the settlement gave no directions as to the mode of executing the power; and that it contained a prohibition against sale or mortgage, which, though it was only understood as a prohibition against sale or mortgage so as to defeat the provisions of the settlement, might have led the tenant for life to execute in the mode of annuity. The judgment expressly guarded against being understood as a decision that in all cases the grant of an annuity by tenant for life having a power, without referring to the power, would be a good execution. (*Marnc v. Blake*, (Irish,) 248, 267.)

2 K

Where the execution of a power is informal, but for valuable consideration, the instrument is to be reformed so as to be an execution in the mode in which the person having the power had a right to execute. (*ib.* 264.)

PRACTICE.

(*Vide* FRAUD—MORTGAGE.)

WHERE there is a decree against an infant it is the practice in England to give the infant an opportunity of showing cause, when he comes of age, against the decree. But that practice seems to have been little attended to in Ireland, till the Irish practice in that respect was reformed by Lord Redesdale. (*Colclough v. Bolger*, (Irish,) 62.)

Where a decision is clearly right, the House of Lords will not remit the cause merely because the Court below has decided it on a different ground from that on which the Lords decide it. (*Young v. Leven*, (Scotch,) 138.)

In a suit by next of kin against an administrator, one of the next of kin appeals, the others do not appeal. The administrator lodges a cross appeal, and the cause stands over for defect of parties, till the other next of kin are made parties Respondents to both appeals. It seems from the final judgment that the next of kin, who did not appeal from the decree below, but who prayed the benefit of the original appeal when called as Re-

spondents as above, were held entitled to that benefit. (*Stacpoole v. Stacpoole*, (Irish,) 218, 230.)

In the Irish Chancery sequestration was the first effectual process, until the practice was in that respect reformed by Lord Redesdale. (*ib.* 222.)

"In a case in Dom. Proc. under the "names of *Eamer* and *Fisher*, or "some such names, an agent was "called to the bar and censured "for printing observations without "signature of counsel." *Per* Lord Chancellor. (*ib.* 223.)

Whether one becoming an incumbrancer on an estate in litigation, without making himself a party to the suit, can appeal against the decree made in it, in the name of the principal party, that party refusing to appeal. (*Daly v. Kelly*, (Irish,) 428.)

It seems that where an estate in litigation in equity is aliened *lite pendente*, the alienee having the legal estate must be brought before the Court in order to convey. But the Court will restrain vexatious alienations made *lite pendente*. (*ib.* 440.)

Bill to restrain proceedings at law on a bond, and injunction granted. The bond held to be a valid security, but instead of dismissing the bill as to the injunction, the Court below decrees payment with interest, not from the date, or from the time at which the amount was made payable, but from a subsequent period, at which time only it appeared that the bond was intended by the parties to be

payable. This, it seems, is well enough, for the bond is relieved against to a certain extent, and the Plaintiff must be presumed to have consented to have the relief made effectual according to the rights of the parties. (*ib.* 137, 138.)

It seems it is not the practice in Ireland, in conveyances by lease and release, to make a lease for a year, the recital in the release being conclusive evidence of the lease. (*ib.* 435.)

R.

RECEIVER.

THE Commissioners of Accounts appointed under 20 Geo. 3. c. 54. having recommended the abolition of the office of the nineteen King's waiters in the customs, the number from that period was not filled up, and the fees of the vacant offices were generally applied to the use of the customs' superannuation fund (now abolished by 51 Geo. 3. c. 55.) though without any legislative authority. By 38 Geo. 3. c. 86. the vacant offices of waiters were abolished, subject to regulation, and the fees for such offices received previous to July, 1798, were ordered to be applied to the fund. The Appellant was appointed receiver in 1799, but as the act 38 Geo. 3. made no provision for the appropriation of the fees of the vacant offices subsequent to 1798, he retained them

in his own hands. By 47 Geo. 3. sess. 1. c. 51. the fees of offices vacant and abolished under 38 Geo. 3. c. 86. received since July, 1798, were directed to be applied to the fund. An information was in 1807 then filed in the Exchequer against the Appellant, for the fees which he still refused to pay, alleging that they ought not to have been received at all, and might be reclaimed by the merchant, or that, if receivable, they belonged to the surviving King's waiters, &c. But it was held that the fees were consolidated, and properly received from the merchant in full, but that the offices were separate and distinct, and that the fees did not go to the surviving waiters; and the Court below decreed for the crown for principal, interest, and costs. But, on appeal, though the Appellant had admitted in his answer below that he had mixed this money with his own and so derived profit from it, the Lords held that, as the money remained unappropriated till 47 Geo. 3., interest ought not to be demanded during the period between 1798 and 1807; and that, as it was a fair question whether the money did or did not belong to the surviving waiters, the Appellant ought not to be called upon to pay costs to the crown.

The Lords were of opinion that this, being public money, might be sued for by the Attorney General in his own name alone; but that, as the

managers of the fund had been added as relators upon the suggestion of the Appellant himself in his answer below, whether the information was objectionable in a general view on that ground or not, he was precluded from availing himself of that objection. (*Mucklow v. Attorney General*, (English,) 1, 9.)

REGISTRATION.

EFFECT of registration in Ireland. (*Daly v. Kelly*, (Irish,) 436.)

RELEASE.

(*Vide PRACTICE.*)

RENUNCIATION.

A., by his marriage-contract, settles lands, on failure of heirs male, on the heirs female of the marriage, and the heirs male of their bodies, and cohabits ten years with his wife without issue. Wife misconducts herself, and divorce obtained, but is delivered of a female child, B., before the decree for the divorce. B. marries C., and with his consent renounces, for a sum of money, all claim under the contract, and dies before A., her presumed father. Held by the Court of Session that this renunciation was good against the son of B., *Sed per Lord Eldon (C.)*, there is a difference between enabling a father to accelerate the implement of a contract by conveying the

estate to his son or daughter (though he should afterwards obtain a reconveyance), and laying down a rule by which an opulent father, without parting with the estate, may, by giving small sums of money to indigent persons who may become entitled, defeat the object of the contract any time he pleases: and the cause remitted for review to the division from which it came, with instructions to take the opinion of the other division.

In the course of the cause the legitimacy of B. was questioned; but *per Lord Eldon (C.)*, concurring with the Judges below, the legitimacy of the child born *stante matrimonio* must be presumed. (*Routledge v. Carruthers*, (Scotch,) 392.)

ROADS.

CERTAIN of the trustees under an act of parliament for making a road, the fund provided by the act being neither sufficient nor available for the object until the completion of the road, raise money on their personal credit to carry on the work, and afterwards bring an action against the other trustees who had attended any of the meetings for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorized at the meeting or meetings which they attended. Held at first by the Court of Session

that the mere fact of presence at meetings did constitute a *prima facie* ground for personal liability and that the *onus* lay on the Defendants to show, if they could, facts and circumstances exempting them from that personal liability. But on an appeal to, and a remit by, the House of Lords, held that the mere fact of presence at meetings did not constitute a *prima facie* ground of personal liability, and that the *onus* lay upon the Pursuers to show acts beyond mere attendance done by the Defendants to render them personally liable; and therefore the defences of those trustees, against whom nothing was alleged and proved except the mere fact of presence at meetings were sustained; but as to those trustees who signed contracts, they were held personally liable for a proportion of the expense of such contracts as they signed; and this judgment affirmed in Dom. Proc.

Dicente Lord Eldon, (C.) That when trustees confined themselves to the act of parliament and the application of the parliamentary funds, they were not personally liable; but that this also rested on strong principle, that as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, and shall be bound to provide funds to pay the contractors. (*Higgins v. Livingstone*, (Scotch,) 341.)

S.

SALE.

(*Vide* FRAUD—CONTRACT.)

A FRAUDULENT sale of an estate, made by tenant for life under a marriage settlement to the prejudice of his son, remainder-man in tail, the son being an infant at the time of the sale, and the purchaser being cognizant of the fraud, set aside though made under colour of a decree in Equity. (*Colclough v. Bolger*, (Irish,) 62, 63.)

A right to a suit in equity not a proper subject of sale under a *fi. fa.* (*Moore v. Blake*, (Irish,) 230.)

Sales of rights to suits in equity said to have been formerly the practice in Ireland. But it seems not to be so now. (*ib.* 247.)

SOLICITOR.

(*Vide* ATTORNEY—MORTGAGE—ACCOUNT—APPEAL—AGENT.)

A SOLICITOR takes a mortgage of his client's estate in litigation as a security for costs. This is a transaction which Courts of justice will look at with great jealousy. (*Daly v. Kelly*, (Irish,) 430.)

SEA-WORTHINESS.

(*Vide* INSURANCE.)

NOTHING in the law of insurance is of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured; and, however honest the intention of the assured may

be, if he is mistaken in the fact, the underwriter is not liable: *per* Lord Eldon, C. (*Douglas v. Scougal*, (Scotch,) 276.)

SUIT (IN EQUITY.)

(*Vide* CONTRACT.)

A RIGHT to a suit in equity not saleable under a *fi. fa.* (*Moore v. Blake*, (Irish,) 230, 247.)

TENANTS (IN COMMON.)

(*Vide* DEVISE—UNCERTAINTY.)

WHERE a tenancy in common is created, the interest or share of each must appear on the face of the instrument creating it. (*Jones v. Hancock*, (Irish,) 199, 203.)

TIME (LENGTH OF).

(*Vide* ACQUIESCENCE—ACCOUNT—CONTRACT—AGREEMENT—DELAY.)

WHERE a fee farm grant or lease at a fixed rent was made of the mortgaged premises by mortgagor to mortgagee, in which there was acquiescence for nearly fifty years, though the transaction was one which Courts of Equity regard with a great deal of jealousy, and one which would probably have been set aside if impeached within a reasonable time, the House of Lords, affirming a decree below, held that the length of time, or long acquiescence, was a bar to the

relief. (*Hicks v. Cooke*, (Irish,) 16, 17, 24, 25.)

Though for a period of twenty years effectual suit for distribution had not been commenced against an administrator, he was held bound to account for the money remaining undistributed, with interest and annual rests during the time of retention; and as the suit, after it was commenced, had been long protracted by him by his setting up unfounded demands, he was saddled with costs of suit incurred by plaintiff subsequent to the original decree. (*Stackpole v. Stackpole*, (Irish,) 209.)

A. conveys lands to B. in consideration, among other things, that B. should execute to A. a lease of a portion of the lands. A. files, in 1782, his bill for execution of the lease, but does not further prosecute the suit till 1801. As the executing of the lease is part of the consideration for which the landlord acquired his title, he cannot refuse performance and yet retain the property; and the principle on which length of time is a bar to relief does not apply. (*Moore v. Blake*, (Irish,) 245.)

TITHES.

BILL, by Vicar of Sturminster Newton, for vicarial tithes in kind against several occupiers of farms. Answers (separate) setting up farm moduses. Issues directed, and the issue respecting Bagber farm (Bul-

len's) tried. Proof for Appellant Bullen, Plaintiff in the issue, by the evidence of old persons that a sum of 5*l.* 3*s.* 4*d.* had been invariably paid for the vicarial tithes of Bagber farm for about sixty years past. Offered in evidence for Defendant (the Vicar), to prove rankness, a rate-paper, from which it appeared that the whole parish had during the same period, paid rates in the same way in lieu of vicarial tithes, amounting together to 68*l.* Offered also certain entries, without date, but proved to be of the hand-writing of the end of the thirteenth or beginning of the fourteenth century, in a book called the Chartulary of Glastonbury Abbey: viz. an entry of the ordination of the Bishop on the appropriation of the church of Sturminster to the Abbey: and the entry immediately following, beginning with the words "portions of the church of Sturminster assigned to the vicarage to be ordained to remain in the same for ever," and then enumerating the several articles with the value of each, without any allusion to a money payment in lieu of the tithes, and making the whole vicarage of the clear yearly value of 9*l.* 12*s.* 5½*d.* This entry was offered as a copy of, or extract from, the endowment, the original being lost. The book was produced from the muniment room of the Marquis of Bath, who had lands which had belonged to the Abbey, but

not in Sturminster Newton. Besides entries in which the Abbey was concerned, the book contained several idle stories, and a great deal of other miscellaneous matter. The rate-paper and Chartulary rejected, and verdict for the modus. But the Court of Exchequer, being of opinion that these documents ought to be admitted, ordered a new trial. Proof for Appellant as before, and the rate-paper and entries in the Chartulary read for the Respondent, besides other documents, to rebut the presumption of a modus. Verdict for Respondent, and against the modus; and new trial, moved for on the ground of the alleged improper admission of the Chartulary in evidence, refused—and appeal to the Lords from this order of refusal.

Objections to the admission of the entries:—1st, that the book did not come from the proper custody; 2d, that the endowment itself could have been no evidence on this issue; and if it could, yet the entry respecting the portions assigned to the Vicar did not purport to be a copy or extract, and was not good secondary evidence; 3d, that this was *res inter alios acta*.

The order of the Court of Exchequer refusing the new trial affirmed by the House of Lords on the grounds, 1st, that the entries had been properly received in evidence, the custody being proper, the entries being authentic copies

of instruments of which the originals would have been good evidence; and *res inter alios acta* being in this case no objection, and also that the whole of the rate-paper was proper evidence on this particular issue: 2d, that, supposing the entries to have been improperly admitted, the verdict was warranted by the other evidence, and that it signified nothing to say that the Jury might possibly have come to their conclusion upon the ground of the Chartulary, because the object of an issue out of equity was to satisfy the conscience of the Court; and where the evidence was such as fully to satisfy the conscience of the Court, a Court of Equity was not bound, either in tithe causes or others, to order a new trial, or to direct an issue originally at all; exercising, however, a sound discretion in each particular case, whether to do so or not. (*Bullen v. Michel, (Clerk,)* (English,) 297, 317, 320, 327.)

Upon an issue, *modus* or no *modus*, as to a particular farm, where it was proved that a certain rate, in lieu of tithes in kind, had been paid for this farm for a period of seventy years, a general rate-paper, from which the tithes of the whole parish was collected, was admitted in evidence, with a view to show that similar rates, in lieu of tithes in kind, had during the same period been paid over the whole parish; and that, if the particular

payment was a *modus*, all the payments were *moduses*, and that the total amount of the payments was of such a size that it was incredible it should have existed so far back as the time of legal memory. (*ib.* 329.)

TRIAL (NEW).

(*Vide* TITHES—EVIDENCE.)

WHERE, on the trial of an issue out of equity, evidence is improperly rejected, if the Court is satisfied that, though that evidence had been received it ought not to have produced a different verdict, the refusal to grant a new trial is in the proper course of proceeding. And if that is the case where evidence has been improperly rejected, it is a nice distinction to say that, where evidence has been improperly admitted, a new trial ought to be granted, though the verdict should be right on other evidence, supposing that evidence so improperly admitted never to have been offered. (*Bullen v. Michel, (English,)* 318, 319, 320, 329, 332.)

TRUSTEE.

(*Vide* RECEIVER—INTEREST—ROADS.)

WHERE a trustee has received money as such, and the mode of putting it out of his hands is ascertained, he ought so to put it out, and if he derives profit from it he ought to be charged with the profit or in-

terest ; but where money remained in the hands of a receiver unappropriated, he not knowing to whom he was accountable for it, till it was appropriated by act of parliament, though he admitted that he mixed it with his own money and made profit of it, it was held that he ought not to be charged with interest for it during the time it remained unappropriated. (*Mucklow v. Attorney General*, (English,) 12, 16.)

A trustee, tutor, and curator, appointed cashier and agent to the trust by co-trustees ; and, when called upon to account, produces accounts made up by accountants from his own instructions. Lord Ordinary appoints objections of a general and preliminary nature to be stated to the accounts, reserving the examination of particulars and vouchers till these should be disposed of. Objections given in, that the accounts were not annually balanced, that interest was allowed only at $3\frac{1}{4}$ per cent., whereas interest ought to have been calculated at 3 per cent. *de die in diem*, from time of receipt till three months after the annual balance, and then on the balance at 5 per cent., and the right to demand all the profits made, stated but not insisted on ; that a charge was made for the service of the accountants which ought to be paid by the trustee and agent, as it was by his negligence in not keeping the accounts himself that their services became necessary ;

that his charge for his own trouble in the management was excessive, and that a charge made for making up titles to certain lands by adjudications in implement without general service and decree of constitution, ought not to be allowed as the titles were improperly completed and therefore useless. After several proceedings, final interlocutor below approving the accounts *in toto* without any examination of particulars. This last interlocutor *reversed* as inconsistent with the reservation in the Lord Ordinary's interlocutor which was not appealed from, and the cause remitted for review as to the rest, so that the claim for all the profits might be insisted upon if that question was still open.

The Lord Chancellor observing that he could not conceive how it came to be imagined that the accounts ought not to be annually balanced ; that it was new in principle to take accounts made up under the directions of one alone of the parties as a ground of judicial proceeding ; that the appointment of a trustee by co-trustees to be cashier and agent to the trust, to be paid as cashier and agent could hardly be supported in England ; that a trustee ought to keep his accounts so regularly at least as to enable the Court to judge how far the assistance of professional accountants might be necessary in the particular case ; but that a trustee acting *bonâ fide* with a view to the interest of the *cestui*

que trust ought not to suffer for mistake, unless he very grossly miscarried. (*Montgomery v. Wauchope*, (Scotch,) 109, 110.)

By the law of England, a trustee can make no profits for himself of the trust fund. Whether the rule of law is not the same in Scotland? (*ib.* 131.)

A road trustee, under an act of parliament, is not, by the mere circumstance of *presence* at meetings where contracts for carrying the act into execution are entered into or approved, rendered personally liable for any part of the expenses incurred by means of such contracts. (*Higgins v. Livingstone*, (Scotch,) 341.)

When persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable, but this rests on strong principle that as the trustees must know whether there are sufficient funds, they, when they contract with those who do not know it, act as if representing that they have funds, and shall be personally liable to provide funds to pay the contractors. *Per* Lord Eldon, C. (*ib.* 355.)

U.

UNCERTAINTY.

(*Vide* DEVISE.)

WHERE there was a devise over, and the specific interest or share so

given over did not appear from the will itself, the devise over was held void for the uncertainty. (*Jones v. Hancock*, (Irish,) 198, 199, 203.)

V.

VOUCHER.

(*Vide* ACCOUNT.)

WHERE settled accounts which remained long unchallenged were opened, oath of party admitted as to the existence and import of vouchers delivered up or lost. (*Morgan v. Lewes*, (English,) 38, 45.)

W.

WAIVER.

(*Vide* AGREEMENT.)

WARRANTY.

(*Vide* INSURANCE.)

WILL.

(*Vide* DEVISE—EVIDENCE.)

EXTRINSIC evidence not admissible to enlarge the effect of a will. (*Doe, d. Oxenden, v. Chichester*, (English,) 65.)

Extrinsic evidence to explain a will admissible only where an ambiguity is raised by extrinsic circumstances; and such evidence is admissible merely because it is ne-

cessary in order to give effect to the will. (*ib.* 93.)

Courts of law have been jealous as to the admission of extrinsic evidence to explain the intention of a testator; and it is of great importance that the admission of such extrinsic evidence should be avoided, as much as possible, that a purchaser, or an heir at law, may be able to judge from the instru-

ment itself, what lands are or are not affected by it. (*ib.* 93.)

WORDS.

(*Vide DEVISE.*)

WHERE one devised his estate "of Ashton," held that it would have made no difference, if the devise had been of the devisor's estate "at Ashton." (*Doc, d. Oxenden, v. Chichester*, (English,) 90, 92.)

END OF VOL. IV.









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